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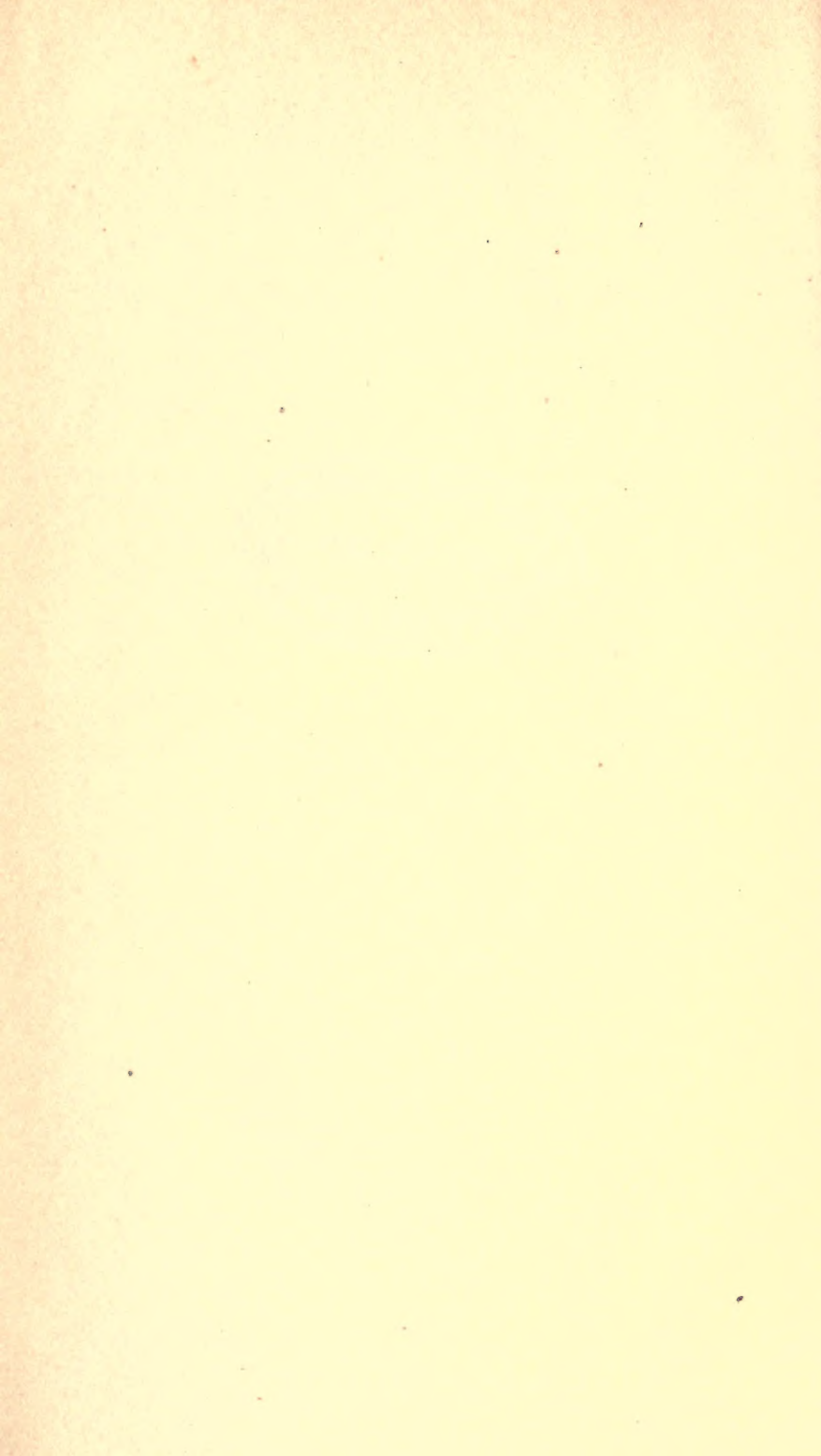
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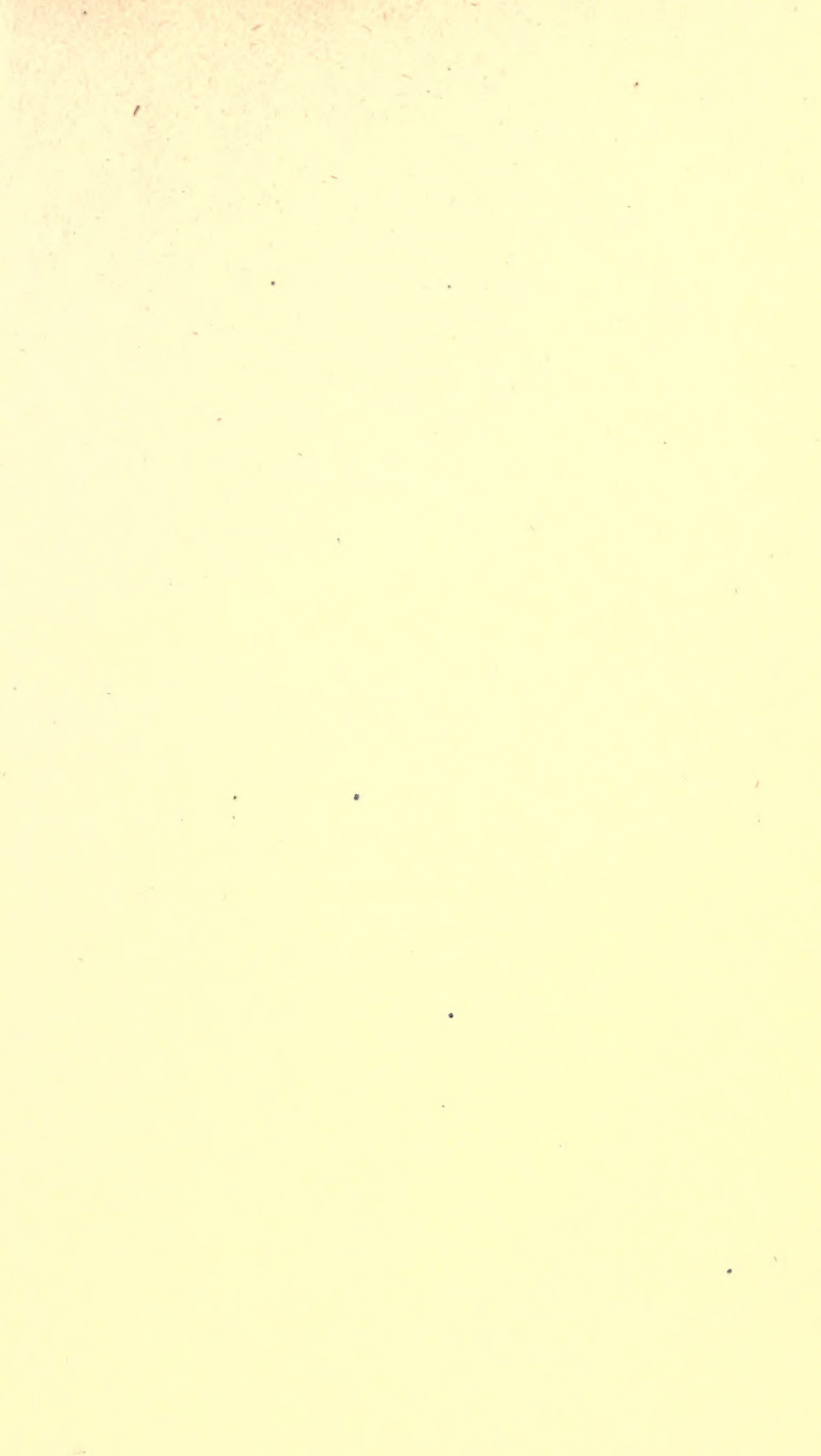




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REPORTS

OF

CASES

ADJUDGED IN

THE SUPREME COURT

OF

PENNSYLVANIA.

BY

WILLIAM RAWLE, JUN.

• WITH NOTES REFERRING TO CASES IN THE SUBSEQUENT REPORTS.

BY

WILLIAM WYNNE WISTER, JUN.,

CONTINUED BY

ELLIS AMES BALLARD.

VOL. IV.

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JUDGES

OF THE

SUPREME COURT OF PENNSYLVANIA.

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MOLTON C. ROGERS, Esq.,	}	Justices.
CHARLES HUSTON, Esq.,		
JOHN ROSS, Esq.,		
JOHN KENNEDY, Esq.,		
THOMAS SERGEANT, Esq., (appointed February 3d, 1834, in the place of JOHN ROSS, Esq., deceased,) . .		

ATTORNEYS-GENERAL.

ELLIS LEWIS, Esq.

GEORGE M. DALLAS, Esq., (appointed October 14th, 1833,
in the place of ELLIS LEWIS, Esq., appointed President of the
Eighth Judicial District.)

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CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT—DECEMBER TERM, 1832.

[PHILADELPHIA, JANUARY 8, 1833.]

The President, Managers, and Company for Erecting a Bridge over the River Lehigh, near the Town of Northampton, *against* The Lehigh Coal and Navigation Company.

APPEAL.

The act of assembly of the 20th March, 1818, "to improve the navigation of the river Lehigh," and that of the 13th of February, 1822, "to incorporate the Lehigh Coal and Navigation Company," in whom the rights, &c., of the grantees under the former act became vested, in providing a remedy for injuries occasioned by the construction of the works, provide for nothing that was not remediable at common law, and, on the other hand, the statutory remedy extends to every common law injury.

A corporation (such as a bridge company,) though not within the letter of the acts, is within their equity, and may recover damages in the mode prescribed by them, for injury sustained in its property.

If a corporation omit to continue the succession to certain offices which constitute an integral part of its body, but these offices be supplied with officers *de facto*, it is sufficient to sustain its existence as to strangers, and to enable it to maintain a suit.

The loss of an integral part of a corporation, works a dissolution to certain purposes only; the corporate franchise being suspended, but not extinguished. An entire dissolution is the result of a permanent incapacity to restore the deficient part, and never happens where the legitimate existence of the part is not indispensable to a valid election, or other means of reproduction.

A forfeiture of the charter of a corporation for abuse or neglect of its fran-

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chise, must be declared by process and judgment of law, before the corporation can be treated as defunct.

The existence of a corporation plaintiff, can be put in issue only by a plea in abatement, or, at least, by such a plea as denies the whole declaration; pleading over specially to the merits, admits the plaintiff's capacity to sue.

[*10] *The legislative grantees of a right to improve the navigation of a river, by erecting dams, locks, &c., with the privilege of entering upon the lands of others for those purposes, have the same right to erect a dam at any place on the river, that a proprietor has to erect one on his own lands; and if chargeable with no want of attention to its probable effect, are not answerable for consequences which it was impossible to foresee and prevent.

For an act of Providence, alone, therefore, they are not answerable. To fix them with liability for mischief done by a flood or storm, there must be a concurrence of negligence with the act of Providence; and in a proceeding against them to recover damages for such mischief, it is for the jury to inquire whether they have used all proper precautions to prevent consequential injury.

In a proceeding to recover damages for an injury done to the pier of a bridge, occasioned by the erection of a dam with a sluice or chasm left for rafts, which in a flood directed the volume of water against the pier, the standard of damages is not the cost of a new pier, unless the old one should be found altogether worthless.

THIS case, which came before the court on an appeal from the judgment of the Circuit Court of *Lehigh* county, held by Huston, J., in April, 1832, originated in a petition presented by the plaintiffs, to the Court of Common Pleas of *Lehigh* county, on the 11th of September, 1830, for a *venire* under the acts of assembly of 20th of March, 1818, entitled "An act to improve the navigation of the river *Lehigh*," (*Pam. Laws*, 197,) and of 13th February, 1822, entitled "An act to incorporate the *Lehigh Coal and Navigation Company*," (*Pam. Laws*, 21.)

The plaintiffs were incorporated by the act of 28th of March, 1797, entitled "An act to authorize the governor of the commonwealth to incorporate a company for erecting a bridge over the river *Lehigh*, near the town of *Northampton*." (5 *Laws of Penn.* 242, *Carey and Bioren's ed.*)

By the first section of this act, commissioners are named for receiving subscriptions: the form of subscription indicated, and five dollars on each share directed to be paid on subscribing. The second section declares, that when fifteen or more persons shall have subscribed one hundred shares, the governor shall incorporate the company; directs what the style of the corporation shall be; authorizes an enlargement of the capital stock, &c. By the third section, the six persons first named in the letters patent, are directed to give notice in two or more *Philadelphia* newspapers, one of which shall be in the German language, and also in the public newspapers at *Easton*, of a time and place by them to be appointed, not less than thirty days from the time of issuing the first notice, when and where the subscribers shall proceed to organize the corporation, by choosing

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"one president, four managers, one treasurer, and such other officers as they shall think necessary to conduct the business of the corporation for one year, and until other officers shall be chosen, and are authorized to make such by-laws, rules, &c., as may be necessary for the well-ordering the affairs of the company," &c. By the fourth section it is provided, that the stockholders shall meet on the first Monday in August in every succeeding year, for the purpose of choosing such officers as aforesaid for the ensuing year. The fifth, sixth, and seventh sections are not material. The eighth directs the mode of keeping the accounts *of the company, which are to be submitted once [*11] a year to the stockholders until the bridge shall be completed, and until all the costs, charges, and expenses shall be fully paid and discharged; it directs that the aggregate amount of all such expenses shall be liquidated and ascertained, and if upon such liquidation, or whenever the whole capital stock shall be nearly expended, it shall be found that the capital stock is not sufficient to complete the bridge, the president, managers, and company are authorized to increase the number of shares to such extent as shall be deemed sufficient to accomplish the work. The ninth section vests the property of the bridge, when completed, in the company; establishes the rate of tolls, and contains a *proviso* that the bridge shall not be erected in such a manner as to injure, stop, or interrupt the navigation of the river or the passage over the ford near to the place where the ferry was then kept. The tenth and eleventh sections are immaterial. The twelfth directs, that accounts shall be kept of the tolls received, and that dividends shall be declared, deducting first, expenses, and such a sum as may be deemed necessary for a growing fund to provide against the decay of the bridge, and for rebuilding and repairing it. The thirteenth section provides that at the end of every third year from the date of the incorporation, until two years next after the bridge shall be completed, an abstract of the accounts, showing the whole of the capital expended in the prosecution of the work, and the income and profit arising from the bridge, during those periods, shall be laid before the legislature, with an exact account of the cost and charges of keeping the bridge in repair, to the end that the clear income may be ascertained, and if it shall appear that the clear income and profits will not bear a dividend of six per cent., the tolls shall be increased so as to raise it to that amount, and at the end of every ten years after the completion of the bridge, a like abstract shall be laid before the legislature, and if the clear income and profits will bear a dividend of more than fifteen per cent., the tolls shall be reduced so as to reduce the dividend to fifteen per cent. The fourteenth section provides, that if the company shall not pro-

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ceed to carry on the work within three years after their incorporation, and shall not complete it within seven years from the passage of the act, the legislature may resume the grant. And the fifteenth section authorizes the legislature, after the year 1820, to take the bridge at a valuation.

This act was revived and amended by an act passed 28th of March, 1806, (4 Sm. L. 341.)

On the 20th of March, 1818, an act of assembly was passed, entitled "An act to improve the navigation of the river Lehigh," (7 Laws of Penn., Read's ed. 86,) by which Josiah White, George F. A. Hauto, and Erskine Hazard, their heirs and assigns, were authorized to enter upon the said river, to open, enlarge, and change its channel, &c., to make dams, locks, or any other device which they should think fit and convenient to make [*12] a good navigation downward, *&c. The second section of this act provides, "that if any person or persons shall be injured by means of any dam or dams being erected, or the land of any person inundated by swelling the water by means of any dam or dams, or any mill or other water works injured by swelling the water into the tail race of any mill, or other water works, which may have been erected in the said river, and if the said Josiah White, George F. A. Hauto, and Erskine Hazard, their heirs and assigns, cannot agree with the owner or owners thereof, on the compensation to be paid for such injury, the same proceedings shall be had as are provided in the third section of this act; the persons valuing the damages, being first sworn or affirmed, or the jury, as the case may be, shall take into consideration the advantages which may be derived by such owner or owners by the navigation aforesaid."

The third section declares, "That the said Josiah White, George F. A. Hauto, and Erskine Hazard, their heirs and assigns, shall have authority and power by themselves or their superintendents, engineers, artists, and workmen, to enter in and upon, and occupy, for the purpose, all land which shall be necessary and suitable for erecting a lock, sluice, canal, tow-path, or other device, doing as little damage as possible, and there to dig, construct, make, and erect, such lock, sluice, canal, tow-path, or other device, satisfying the owner or owners thereof, but if the parties cannot agree upon the compensation to be made to such owner or owners, it shall and may be lawful for the parties to appoint six suitable and judicious persons, who shall be under oath or affirmation, and who shall reside within the proper county where the land lies; or if they cannot agree on such persons, then either of the parties may apply to the Court of Common Pleas of the proper county where the land lies, and the said court shall award a *venire* directed to the sheriff, to summon a

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jury of disinterested men, in order to ascertain and report to the court what damages, if any, have been sustained by the owner or owners of the ground by reason of such lock, canal, sluice, tow-path, or other device, passing through his, her, or their land, which report being confirmed by the court, judgment shall be entered, and execution shall issue, in case of non-payment, for the sum awarded, with reasonable cost to be assessed by the court. And it shall be the duty of the jury, or the six appraisers, as the case may be, in valuing any land, to take into consideration the advantage derived to the owner or owners of the premises from the said navigation: *Provided*, that either party may appeal to the court within thirty days after such report may have been filed in the prothonotary's office of the proper county, in the same manner as appeals allowed in other cases." This section also contains a provision in relation to *femmes couvertes*, persons under age, *non compotes mentis*, or out of the state.

On the 13th of February, 1822, an act of assembly was passed, (Pam. Laws. 21,) to incorporate "The Lehigh Coal and Navigation *Company," the preamble of which recited the act [*13] of 20th March, 1818, to "improve the Navigation of the river Lehigh," by which certain rights were granted to Messrs. White, Hauto, and Hazard: That they had conveyed to the Lehigh Navigation Company, all the rights vested in them by that act, reserving certain residuary profits: That Messrs. White, Hauto, and Hazard, had purchased certain estate in sundry tracts of coal land, which for the purpose of raising funds, they had conveyed to trustees for the use of certain persons furnishing the funds, and associated under the name of "The Lehigh Coal Company," reserving certain residuary profits and exclusive rights in the management of the company: That these companies had united and amalgamated themselves into one company, under the name of The Lehigh Navigation and Coal Company, confirming to Messrs. White, Hauto, and Hazard, the residuary profits, and exclusive rights before reserved by them: That Hauto had agreed to convey all his rights to White and Hazard, which agreement had been carried into effect, and the funds of the company being still insufficient for the objects of the association, it was agreed between the stockholders in the said company, and the said White and Hazard, that the name of the company should be changed to that of "The Lehigh Coal and Navigation Company:" That the capital stock should be increased by the admission of new subscribers, and that in consideration thereof, and certain shares of the stock of the new company to be given to them, White and Hazard should release to the company their reserved rights,

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and convey to trustees, in the new company, all their rights to the water power, and come in as simple stockholders under the new association, &c. The act, therefore, in the first section, incorporates the new company, by the name of "The Lehigh Coal and Navigation Company," with the usual corporate powers, &c. The second section vests the property of the former association in the new corporation, and provides that its contracts shall continue in force. The third section confirms to the corporation the rights and privileges granted to Messrs. White, Hauto, and Hazard, by the act of 20th of March, 1818. The seventh section, declares, that in the appraisement of damages, and valuation of materials provided for by the second, third, fourth, fifth, or any other sections of the above mentioned act, if either party shall require it, the referees, or persons composing the jury of valuation, shall not be taken from within seven miles of the river Lehigh.

The petition presented by the plaintiffs to the Court of Common Pleas, in pursuance of the provisions of these acts of assembly, alleged damage and injury to their property, in the following particulars, viz. :

First. By the erection and construction of the defendant's dam, it was alleged that the middle pier of the bridge was undermined, and the foundation of it cracked and split, and totally ruined, and the value of the bridge impaired to the amount of ten thousand dollars.

[*14] **Second.* That by reason of the blasting of rocks, earth, and stone, in the construction of the canal, &c., above and below the bridge, a house erected on the bridge, of the value of five hundred dollars, was shattered, torn in pieces, prostrated, and totally destroyed.

Third. That by reason of the blasting of rocks, stones, and earth, as aforesaid, a large and substantial iron chain was severed and broken, and the frame and wood work of the bridge seriously injured, thereby further impairing the property of the plaintiffs to the value of five hundred dollars.

Fourth. That certain scaffolding made use of in repairing the bridge, was prostrated, swept away, and totally destroyed, thereby further impairing the value of the plaintiffs' property to the amount of two hundred dollars.

Fifth. That by reason of the construction of the dam across the river, &c., a large quantity of stone and gravel was forced down the river which has seriously injured the property of the plaintiffs.

Sixth. That the plaintiffs being seized in their demesne as of fee of a certain tract of land, &c., in Hanover township, &c., containing fifty feet square, the defendants had, in constructing

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their lock and tow-path, fifty feet in length, and thirty-seven feet in width, upon and through this land, deprived the plaintiffs of the use and occupation of the land, and impaired the value of their property to the further amount of one hundred dollars. And other wrongs and injuries, &c. That the defendants had made no compensation, &c.

By virtue of this *venire* the sheriff summoned an inquest, who on the 18th of October, 1830, returned an inquisition finding that damages to the amount of six thousand three hundred and seventy-one dollars, had been sustained by the plaintiffs, "exclusive of any advantages which may be derived to the said, 'The President, Managers, and Company, for erecting a bridge,' &c., from the navigation of the said river Lehigh, improved by the said, 'The Lehigh Coal and Navigation Company,'" and accordingly assessed the damages at that sum.

From this finding the defendants appealed to the Court of Common Pleas of Lehigh county, and afterwards removed the cause into the Circuit Court.

The plaint filed by the plaintiffs, set forth, in substance, that by virtue of the act of 28th of March, 1797, and that of 28th of March, 1806, the plaintiffs were incorporated by the corporate style aforesaid, and in and during the years 1813, 1814, and 1815, erected and constructed a good and substantial bridge composed partly of stone, partly of wood, and partly of iron, called a chain bridge: That the right, title, property, and interest in the bridge, with the right of taking toll, were, and ever since have been, and are now, absolutely vested by the provisions of those acts of assembly, in the plaintiffs, their successors, and assigns forever: That between the 1st of January, and 20th of June, 1829, the defendants constructed a dam across the river, leaving a sluice, or passage, in the dam, which threw *the water along the east side of the middle pier of the bridge, by which the pier was undermined, the founda- [*15] tion of it sunk, and the pier itself cracked and split and totally ruined, by reason whereof the value of the bridge was impaired to the amount of ten thousand dollars: That the defendants, by blasting, and blowing rocks, earth, and stone, in the construction of a certain canal, lock, tow-path, and other devices at, above, and below, the east end of the bridge, on the 21st of October, 1828, severed and broke down a large and substantial iron chain, in consequence of which the floor of the bridge was thrown down, and the frame and wood work, greatly injured, by which the plaintiffs sustained damage to the amount of five hundred dollars: That by reason of the same causes, a frame house on the eastern pier of the bridge was torn in pieces, prostrated and totally destroyed, to the further damage of the plaintiffs five

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hundred dollars; and that by the occupation by the defendants of the plaintiffs' land for a lock and tow-path, they had sustained further damage to the amount of five hundred dollars.

The defendants pleaded that they had not committed the damage complained of, upon which issue was joined.

On the opening of the case to the jury, the plaintiffs' counsel claimed damages, 1st, For the undermining of the pier; 2d, For the land occupied by the canal and tow-path; 3d, For the shattering of the bridge by blasting stone in the canal; 4th, For the loss of scaffolding; and lastly for the loss of tolls.

After having given in evidence the act of 28th March, 1797, authorizing the incorporation of the Bridge Company, the supplementary act of 28th March, 1806, and the charter of incorporation, dated 12th of March, 1812, and shown title to the piece of ground, fifty feet square, already mentioned, the plaintiffs' counsel called a witness, who was sworn, but before he was examined the defendants' counsel objected to any further evidence being given, until it should be shown, by proof of the election of officers held according to law, that the corporation was still in existence. The witness was then withdrawn, and the book of minutes of the company produced, from which it appeared, that on the 16th of May, 1812, an election was held, when James Greenleaf was elected President, Jacob Clader, John Mohr, John Kerper, and Jacob Newhard, Managers, and George Graff, Treasurer; and that on the 13th of June of the same year, by-laws were passed. No minute appeared in the book of any meeting from the 30th of July, 1813, to the 1st of September, 1814. On the last-mentioned day, James Jameson, President, Jacob Newhard, Jacob Clader, Christian Young, and Abraham Smith, Managers, met, &c.

The plaintiffs' counsel then read the act of 23d of April, 1829, (Pam. L. 320,) authorizing the stockholders of the Bridge Company to meet and fill all vacancies which then were, or which might thereafter be caused, by the death or resignation of the officers or managers of the company, or from any other cause whatever, and providing that at least two weeks' notice of the [*16] time, place, and purpose of such *meeting, should be published by the direction of some officer, or at least three stockholders of the company, in one or more of the newspapers printed in the borough of Northampton, and also that the special elections to be held under the provisions of this act, should, in other respects, be conducted in the manner that the annual elections of the company were by law directed to be conducted.

From the minutes it appeared that elections for officers took place on the 3d of August, 1829; on the 3d of August, 1830,

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and on the 18th of April, 1831. No election was held on the 3d of August, 1831.

The defendants' counsel still objected to any evidence being given in the cause, until it was shown that the officers of the corporation had been regularly elected.

His Honour declared that he would let the cause go on, though he entertained strong doubts on the subject. At the request of the defendants' counsel, he noted the decision.

The plaintiffs' counsel then showed entries in the book of minutes, of elections in several years, and also loose papers purporting to be certificates of other elections, not recorded or entered in the minute book, a list of which was furnished to the court; but they were objected to as evidence until they should be proved.

A number of witnesses were examined on behalf both of the plaintiffs and defendants, in relation to the injuries complained of by the plaintiffs. Their statements as to the nature, causes, and extent of these injuries (to insert which would occupy too much space), differed materially from each other.

His Honour left the *quantum* of damages to the jury as a question of fact, giving it as his opinion, that the plaintiffs were entitled to recover damages to the extent of the injuries sustained, but intimating, that, from the whole evidence, the amount did not appear so great as the plaintiffs alleged; and instructing the jury, that they ought not to take into consideration any advantages which the plaintiffs might have derived from increased tolls in consequence of the increase of business occasioned by the works of the defendants.

The jury on the 19th of April, 1832, returned a verdict in favour of the plaintiffs, for five thousand seven hundred dollars.

A motion was made for a new trial, which being overruled, the defendants appealed.

The following were the reasons assigned for a new trial, viz. :

First. That the injuries sustained were not remediable by the proceedings instituted.

Second. That there was no proof of the existence of such a corporation as the plaintiffs' at the time the alleged injuries are said to have been committed.

Third. That a corporation cannot institute such a proceeding as the present against the defendants.

Fourth. That the verdict is contrary to law, the evidence in the *cause, and the charge of the court as to the *quantum* of damage, or extent of the injury for which damages [*17] could be recovered.

Fifth. That the judge erred in so much of his charge as ex-

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cluded from the consideration of the jury, the advantages derived by the plaintiffs, from the works of the defendants.

Davis and *J. M. Porter*, for the appellants,—after adverting to the second section of the act of 20th of March, 1818, “to improve the navigation of the river Lehigh,” which provides a remedy for injuries occasioned by dams erected by the defendants, contended—

1. That the case of the plaintiffs did not come within the purview of that act; but that if the injuries complained of really had been sustained, the remedy for part of them, at least, was at common law. On the trial, claims for damages of two kinds were submitted to the jury; one founded upon the alleged injuries to the pier; the other upon the occupation of the plaintiffs’ land, for a canal and tow-path. The first is clearly not embraced by the act referred to, which provides a remedy for damages done to land, mills, or other water works by the swelling of the water of the river. A bridge, it will not be pretended, comes within the description of a mill or other water works. Nor is it land, or taxable as such for raising county rates and levies. *Permanent Bridge Company v. Frailey*, 13 Serg. & Rawle, 422. The alleged injury, moreover, was not the direct and immediate consequence of the works of the defendants. The injury is ascribed to a sluice left in the dam and an unusually high freshet, caused by heavy rains, which produced an extraordinary flood of water through it, in consequence of which the pier was undermined and cracked. Ordinary freshets had done no injury, but the extraordinary one of December, 1829, produced the mischief. These facts present a case of consequential damage, for which at common law the remedy would be an action on the case. The act of assembly was intended to provide a remedy for those injuries which were the necessary and immediate result of the construction of the works of the defendants, leaving it to the common law to redress all injuries which were not embraced by the statute. *Shrunk v. The Schuylkill Navigation Company*, 14 Serg. & Rawle, 71, 83; *Chestnut Hill and Spring House Turnpike Company v. Rutter*, 4 Serg. & Rawle, 6; *The Schuylkill Navigation Company v. Thoburn*, 7 Serg. & Rawle, 411.

If then the plaintiffs have sustained an injury for which they have redress, they have mistaken their remedy in proceeding under the act of assembly. But there is no redress for the grievance complained of. The ninth section of the act incorporating the bridge company declares expressly, that they shall not injure, stop, or interrupt the navigation of the river. Hence it follows, that if in order to preserve the navigation of the river, it became necessary to injure the bridge, the defendants had a

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right to do so, and the damage sustained is *damnum absque injuria*.

*2. The second reason assigned for a new trial involves a question of considerable importance. It resolves itself into [*18] two propositions. *First*, Is a corporation dissolved by repeated neglects to elect officers and to comply with the other requisitions of the act authorizing the grant of a charter of incorporation? *Second*, If the corporation be dissolved, can its dissolution be taken advantage of in this proceeding, and under the pleadings in this cause? In considering the first proposition, it is necessary to look to the origin, progress, and present condition of corporations. This is said to be the age of improvement, and particularly of internal improvements, and if so, the law must keep pace with the general progress of society. The doctrine to be found in the English books prior to the Revolution, has reference to a species of corporations then most usually existing, viz., municipal corporations; but there is a wide difference between corporations established for the government of towns, and private corporations established for the purposes for which the plaintiffs were incorporated. It is to municipal corporations that Blackstone refers (2 Bl. Com. 37,) when he speaks of corporations as franchises. Of these corporations, it is said by Domat (452,) that "their design is to provide some good that is useful to the public." All the foreign adjudications have favoured corporations on the ground, that through their instrumentality, the people regained from the crown some portion of those rights of which it had possessed itself. If the franchise ceased, it reverted to the crown, which was thus strengthened against the people. Here, on the contrary, the people are the only legitimate depository and source of power. Whatever is given to an association of individuals, is so much abstracted from the rights of the citizen, and when these rights are forfeited, from any cause, they revert to the community at large. A different reason existing, a different law must be the result. It is true that Chief Justice Marshall, in the case of Dartmouth College v. Woodward, 4 Wheat. 518, said, "that, the public benefit supposed to be derived, is such a sufficient consideration for the grant of corporate privileges, that when such a grant is made it is considered in the nature of a contract and cannot be revoked." Yet the accuracy of this doctrine, with the utmost deference to the high source from which it emanated, may be doubted. It seems to have been adopted without due regard to the distinction already adverted to. This case, however, decides nothing more than that a corporation for literary and scientific purposes, cannot be deprived of anything strictly belonging to it. The policy of this country is to restrain, not to

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enlarge, corporate rights. *Beattie v. Lessee of Knowler*, 4 Peters, 152. In England, on the other hand, the courts adopting the views of Sir James M'Intosh, that the revival of order, security, industry, trade, and the arts, were attributable to the grants made by, or extorted from feudal tyrants to free cities and towns, from which all the free and regular government which succeeded the prostration of the civilization and science of the [19] Roman empire proceeded, *pursued a different policy, and extended the circle of corporate privileges as widely as possible; much more so than it would be expedient to do here. The defendants do not ask that anything properly belonging to the plaintiffs shall be taken from them; they merely ask that they shall be confined to the path prescribed by the law. They aver, that under the act by which the plaintiffs were created, there were certain conditions precedent to the grant of the charter, and certain conditions subsequent, necessary to be complied with, in order to secure a continuance of their corporate privileges. Bridge companies are private corporations, created partly for the accommodation of the public, but mainly for the private emolument of the stockholders. They are permitted to take toll from citizens who are travelling, and their conduct should therefore be strictly guarded. To entitle the corporation in question to perpetual succession, many things were necessary to be done on their part, and among others, they were bound to elect their officers annually, at the time, in the manner, and after giving the notice prescribed in the act. (The different sections of the act incorporating the plaintiffs were here referred to and commented on.) Municipal corporations have been held to be dissolved, even in England, by failure to elect officers on the charter day, when the chief officer was not entitled to hold over, inasmuch as the corporation had no power afterwards to elect one. *Angel & Ames*, 505. This evil was remedied by the stat. 11 Geo. 1, ch. 4, sec. 1. Chancellor Kent has indeed held, that though a corporation be dissolved, its powers cannot be taken from it collaterally, and that this can only be done by legal process. 4 John Ch. R. 313; 5 John. Ch. R. 379. But what is a collateral proceeding? Surely not a suit by the alleged corporation. Under the general issue a corporation plaintiff must prove its existence. *Angel & Ames*, 377. See also 5 Mass. Rep. 547; 3 Mass. Rep. 276; 12 Mass. Rep. 400; 10 Mass. Rep. 91. The omission to comply with the requisitions of the act in this case, was clearly a forfeiture or loss of the charter, and the only question is, whether it can be taken advantage of in this proceeding. The vast increase of corporations in Pennsylvania, now calls for a different rule on this subject from that which at one time might have been deemed sufficient, and on this

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principle this court has acted. In the case of *Bushel v. The Commonwealth Insurance Company*, 15 Serg. & Rawle, 176, in which it was decided that a writ of foreign attachment would lie against a corporation, Judge Rogers says, "with the multiplication of corporations which has and is taking place, to an almost indefinite extent, there has been a corresponding change in the law respecting them. This change in the law has arisen from a change in circumstances, from that silent legislation by the people themselves, which is continually going on, in a country such as ours, the more wholesome because it is gradual, and wisely adapted to the peculiar situation, wants, and habits of our citizens." If it be said that the matter should have been pleaded in *abatement*, according to the case of *First Parish in Sutton v. Cole*, 3 Pick. Rep. 245, the reply is, [*20] that whenever a plaintiff sues improperly, the defendant can take advantage of it on the general issue. It is to take advantage of an error in the character or number of defendants, that a plea in *abatement* is necessary. *Wilson v. Wallace's Ex'r*, 8 Serg. & Rawle, 53; *Kennedy v. Ferris*, 5 Serg. & Rawle, 396; 1 Chitty's Pl. 497.

3. It was not the design of the legislature to give to corporations a statutory remedy for injuries done to their property. The third section of the act of 13th of February, 1822, vests in the Lehigh Coal and Navigation Company all the rights, privileges, immunities, &c., given by the act of the 20th of March, 1818, to Messrs. White, Hauto, and Hazard, upon the same terms, and subject to the same duties imposed upon them; and the second section of the latter act provides a remedy for any person or persons whose property may be injured by the works in contemplation. The plaintiffs cannot bring themselves within the terms of the act, as they do not answer the description of person or persons. When a statute is intended to embrace corporations, as well as natural persons, its usual language is, "if any person or persons, bodies politic or corporate in law," &c. The omission of these customary words, clearly indicates the intention of the legislature not to extend the provisions of the act to artificial persons.

4. The verdict was erroneous as to the *quantum* of damages, and the extent of the injury for which they were to be recovered. It makes the defendants pay for a pier which is still substantial and good, and which, according to the evidence, may last many years, as if it were entirely useless, dangerous, and ready to fall down. It is a verdict in anticipation of a total loss, or a claim for a total loss, without abandoning the bridge to the defendants. (The counsel here referred to and remarked upon the evidence in support of their views on this point;)

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they also cited *The Schuylkill Navigation Company v. Thoburn*, 7 Serg. & Rawle, 411, for the rule by which damages are to be estimated.)

5. The jury ought to have taken into consideration the advantages which the plaintiffs derived from the works of the defendants, as well in the general increase of travelling, as in the profit derived from the contractors, and those employed by the defendants, in crossing and recrossing. The act of assembly expressly declares, that the advantage derived to the owner or owners of the premises alleged to be injured by the improvement of the navigation, shall be taken into consideration in the assessment of damages. That the plaintiffs were benefited by the works of the defendants, cannot be denied, and if so, that benefit must be considered in a claim for damages, under the provisions of this act. If, on the other hand, the property of the plaintiffs was of such a nature, that it could not possibly be benefited by [*21] the improved navigation of the river, it was not in the *contemplation of the legislature, and the injury to it was not provided for, and consequently no proceeding founded upon the act can be maintained to recover damages.

Gibon and J. Sergeant, for the appellees, (who were requested by the court to confine their argument to the first and fifth points) argued :—*First*, That the cases referred to by the opposite counsel, to show that corporate grants are to be strictly construed, establish that position in favour of individuals. This is a case of corporation against corporation, with this difference as to their rights, arising from their relative situations; that the Bridge Company being in the position in which individuals are usually placed, are entitled to a liberal construction in their favour, and a strict one against the defendants, who are asserting their corporate rights. There are two kinds of wrong which may be done to an individual by a corporation; the one by a rightful, the other by a wrongful act. The first is within the charter powers of the corporation; the last is not. The legislature cannot grant the power to commit the first, without at the same time providing a compensation for the injury inflicted. Where they give no remedy for an act to be done by a corporation, the commission of that act makes the corporation a wrongdoer in respect to the injured party. The legislature, therefore, usually provides a remedy co-extensive with the injury produced by the exercise of the privilege granted. The remedy, thus provided, is for the advantage of the corporation, and granted at their request, to protect them from incessant liability to common law remedies. It is a fair construction of such an act, to extend the remedy to every injury which can be committed by

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a corporation within the limits of its charter. That an injury has in the present instance been sustained by the plaintiffs, for which they are entitled to some remedy, it is going too far, to deny. On this point, the case of *The Chestnut Hill and Spring House Turnpike Company v. Rutter*, 4 Serg. & Rawle, 6, is conclusive. It differs essentially from the injury complained of in *Shrunk v. The Schuylkill Navigation Company*, 14 Serg. & Rawle, 71, in which it was held, that the owner of a fishery is not entitled to damages for an injury sustained in consequence of erecting a dam across the river, which prevented the fish from passing up the stream. The basis of that decision was, that no man could in point of law be injured, by being deprived of that which did not belong to him. On the contrary, he should be thankful that he has been permitted to enjoy it so long. But the injury complained of in the present case, is of a different character. It is an actual injury to substantial and valuable property, belonging to the Bridge Company; not to a common property, like a fishery, in which the whole community has equal rights, but in relation to which the owner of the adjoining shore possesses certain advantages arising from the accident of situation. Unlike the owner of a fishery, the Bridge Company have exclusive rights, privileges, and property. No one can cross the bridge without *paying toll, any more than he can pass [*22] through the Lehigh canal without paying toll, and if the legislature were to pass an act authorizing that to be done, the defendants would hardly say it was *damnum absque injuria*. This part of the case is too clear for further argument. Is then the injury sought to be redressed, comprehended within the special provisions of the act of assembly? If it is, it is the only mode of redress to which the plaintiffs can resort, as, they are cut off from a common law remedy where a statutory one is given. Act of 21st March, 1806, *Purd. Dig.* 34. The case of *The Chestnut Hill and Spring House Turnpike Company v. Rutter*, 4 Serg. & Rawle, 6, strongly supports the affirmative of this proposition. Whatever is authorized by an act of the legislature, is within its remedial provisions. The only safe course is to make the remedy co-extensive with the injury sustained. The second and third sections of the act "to improve the navigation of the river Lehigh," which must be taken in connection with each other, provide a remedy for all injuries resulting from the erection of dams, or the inundation of the lands of any person, by swelling the water by means of dams, &c. Under the provisions of this act, the company had a right to erect dams, when and where they please, to leave a sluice, and to do many other things, the effect of which would be necessarily injurious to the property of others. But this unquestionable right was

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coupled with a condition, that they should make an adequate compensation for the damage they might produce, in the manner indicated by the act. As the right was without limitation, so must be the remedy. The injury was the immediate and necessary consequence of the erection of the defendants' works. Had it not been for the existence of the dam and the sluice, no injury would have taken place. The bridge had stood floods before, which were by no means extraordinary occurrences. They are as regular in our rivers as the rise of the Mississippi or the Nile; every one takes them into calculation; in every river there is a low-water mark, to distinguish it from the high-water mark occasioned by freshets. The legislature knew what would be the probable consequence of the construction of the works, for the improvement of the navigation of the Lehigh, and it is impossible they could have intended to grant the right of destroying the bridge, without compensation. Before the grant the defendants had no right to the river. They take it subject to the condition of making compensation in the manner prescribed by the act. The question of damages may be perplexing, but that is no reason for denying them, if an injury has been sustained. This is one of the chief difficulties of this case, but such difficulties exist in every case, and the jury must get at the standard of damages in the best manner they can. They must consider the matter in some degree prospectively; they must examine witnesses to ascertain as well the injury actually sustained, as that which will probably ensue; and come as near to a just result as the nature of the case will permit. In actions of slander, the difficulty of determining the exact amount of injury done, is [*23] infinitely greater, yet this is never urged as a reason why damages should not be given. Why then be so scrupulous in a case like this? To suppose the legislature intended to confer on the defendants the power to commit such injuries, without at the same time intending to provide a remedy, would be to impute to them the greatest injustice.

3. The charge of the judge was in accordance with the act of assembly. The jury are to take into consideration the advantages which may be derived, and not those which have been derived from the works of the Coal and Navigation Company. The charter to the Bridge Company is a contract between that company and the people, and there is no mode by which the grant can be resumed, or the advantages secured to them taken away, but by a violation of the charter on the part of the company, or by purchase, in the manner pointed out by the act. The advantages which the legislature had in view, when they said they should be taken into consideration in assessing damages, were those of a permanent and substantial character; not

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temporary and accidental, as these were. The right to take toll was given as a compensation for the use, and wear and tear of the bridge, and it is plain, that its increased use must increase its wear and tear, require additional expense to keep it in order, and accelerate its destruction. It by no means follows from the increase of travelling, that the value of the property is increased. The stock of the Germantown Turnpike Company was once as high as a hundred and nineteen; it is now below fifty, yet travelling on that road has greatly increased. The same thing may be predicated of many other turnpike roads. His Honour, therefore, did not err in saying, that the advantages arising from an increase of tolls, in consequence of an increase of business produced by the defendants' works, ought not to be taken into consideration by the jury.

The opinion of the court was delivered by

GIBSON, C. J.—As the cause is to go to another jury, it is necessary to determine all the points; and haply they are not attended with difficulty. The legislature evidently meant to provide for nothing that was not remediable at the common law; and on the other hand, it was intended that every common law injury should be redressed by the statutory remedy. A corporation then must be let into the benefit of it, or be left without redress; so that taking an artificial person not to be within the letter of the act, it is clearly within the equity of it, and the statutory provision being remedial, is to be extended to cases in equal mischief. Still it has been insisted, that the corporation plaintiff was dissolved, by having omitted to continue the succession to certain offices supposed to be integral parts of its body. These, however, were supplied with officers *de facto*, which was undoubtedly sufficient to sustain its existence as to strangers. It is now well understood, that the loss of an integral part, works a dissolution only to certain purposes; the corporate franchise being *suspended, but not extinguished. An entire [*24] dissolution, being the consequence of permanent incapacity to restore the deficient part, never happens where the legitimate existence of the part is not indispensable to a valid election, or other means of reproduction: and here it is perfectly clear that a new election might be had. This principle was asserted for satisfactory reasons in *Phillips v. Wickham*, 1 Paige, 590; and in *Slee v. Bloom*, 5 Johns. Ch. 366, we have the very case. There a corporation was not dissolved by an omission to elect trustees for more than two years, the members constituting the integral parts having remained *in esse*, and continued in office till others were elected; and had the rule been otherwise, it was held that a forfeiture of the charter for abuse or neglect

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of its franchise, must be declared by process and judgment of law, before the corporation can be treated as defunct. Still further it was held, in *First Parish, in Sutton v. Cole*, 3 Pickering, 245, that the existence of a corporation plaintiff is to be brought in question only by plea in abatement; and the same view seems to have been taken by a majority of the judges in *Monumoi v. Rogers*, 1 Mass. R. 159. Certainly the matter must be put in issue by such a plea, or at least one which denies the whole declaration; for pleading over specially to the merits, as was done here, clearly admits the plaintiff's capacity to sue. On all these grounds, then, the point of corporate existence was sufficiently established.

The principle involved in the exception, that the verdict is against law and the evidence, though perfectly plain in itself, is more doubtful in respect of its application to the facts. The defendant had the same right to erect the dam at the particular place, that a proprietor has to erect a dam on his own land; and if chargeable with no want of attention to its probable effect, is not answerable for consequences which it was impossible to foresee and prevent. Where a loss happens exclusively from an act of Providence, it will not be pretended that it ought to be borne by him whose superstructure was made the immediate instrument of it. Had the timbers of this dam been torn from its foundation by the violence of a flood, and carried with irresistible force against the bridge, the defendant could have been made liable but by proof that the timbers had been left exposed without proper fastening, during the season of high water, and ice, when such an event was to be expected. It will be seen, therefore, that the concurrence of negligence with the act of Providence, where the mischief is done by flood or storm, is necessary to fix the defendant with liability. I have found no case illustrative of this principle where the loss was occasioned by water, but it is plainly established by those in which the agent was fire. For instance, an action on the case lies on the custom of the realm, against the master of a house, if a fire, accidentally kindled in it, consume the house or goods of another; and this, though it be kindled without the knowledge of the master, and by a servant, guest, or any one else, who has entered by his consent. [*25] 1 Rol. 1, l. 25; 3 Lev. 359; 1 Salk. *319. It would be otherwise, however, if the fire were kindled by lighting. In *Turbervil v. Stamp*, 1 Salk. 13, the distinction is perhaps more intelligibly put. To an action on the custom of the realm, for negligently keeping fire in a close, by which the plaintiff's grass was burnt in an adjoining close, it was objected that the custom extends only to fire in the house which is within the party's power; but it was not allowed; "for the fire in his

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field," it was said, "is his fire, as well as that in his house; he made it, and must see that it does no harm, or answers the damages if it does. Every man must use his own so as not to hurt another; but if a sudden storm had risen which he could not stop, it was a matter of evidence, and he could have shown it." (S. C. Skinner, 681, and Comyn's Rep. 32.) From motives of sympathy for the unfortunate master of a house in which a fire has originated, actions on the custom are abolished by the stat. 6 Ann, c. 31; but that there was nothing local or peculiar in the custom, is shown by Clay's Case, (Cro. Eliz. 10,) in which it being mooted whether a man who shoots at a fowl and fires his own house, by which that of his neighbour is consumed, be liable on the custom, it was answered, that he is not, but that he is liable in an action on the case generally, for the injury is the same whether the mischance be by negligence or misadventure. The ground work of the common law principle seems to be, that some degree of negligence is imputable in every case of accidental fire, produced by human means; and it is universally just that a loss shall be borne by him whose act contributed to it. In the case at bar then, it will be for the jury to inquire whether the defendant used all proper precaution to prevent consequential injury. It would seem the river is between five and six hundred feet in breadth; that the bridge is supported by three piers; that in the dam placed between eighty and a hundred feet above it, a chasm was left for the passing of rafts, which directed the volume of the water against the centre pier; and that this chasm was thus left for at least six months during the season of rain and ice when high floods are expected to prevail. It will become a question depending on a due consideration of these facts, whether danger to a pier thus exposed, was not to be apprehended, and whether the agents of the defendant were not bound to inquire into the nature of its foundation, and every circumstance that might conduce to a just estimate of the risk. It will be worthy of inquiry, too, whether the duration of the exposure was not unnecessary and unreasonable, and whether the construction of the body of the dam ought not to have immediately preceded the permanent provision, if any were intended, for the accommodation of those who should prefer to use the bed of the river. Should the defendant be found delinquent in these respects, compensation will be made in damages; the measure of which, however, ought not to be the entire cost of a new pier (the standard assumed by the jury in the present instance) unless the old one should be found altogether worthless. But the evidence is strong to show that it may last not only many years, but as long as if its foundation had not been *disturbed, the effect of the current being [*26] to fill up the excavation, and rather to repair the injury,

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than increase it. Concurring then with the judge who tried the cause, that the damages are excessive, we feel ourselves bound to direct another trial.

Judgment reversed and a new trial awarded.

Cited by Counsel, 6 Wh. 113; 3 W. 49; 7 W. 290; 2 W. & S. 201; 6 W. & S. 111; 7 Barr. 357; 5 H. 405; 7 H. 16, 137; 8 H. 76, 87; 10 H. 63; 3 C. 313; 9 C. 78; 10 C. 281; 12 C. 199; 2 Wr. 285; 9 Wr. 413; 1 S. 89; 4 S. 169, 348; 6 S. 463; 10 S. 438; 12 S. 363; 14 S. 108; 16 S. 96; 26 S. 269; 4 O. 442; s. c. 12 W. N. C. 358; 6 O. 31; 1 W. N. C. 469; 12 W. N. C. 557.

Approved in, 4 H. 398.

Cited by the Court, 2 W. 117; 9 W. 120; 10 W. 87; 1 W. & S. 352; 6 Barr. 383; 1 H. 142; 5 H. 135; 3 C. 104.

[PHILADELPHIA, JANUARY 8, 1833.]

M'Crelish *against* Churchman and Another, Assignees of Pray.

IN ERROR.

Under the plea of payment to a *scire facias*, on a mortgage, with notice of special matter, if the defendant intend to insist on fraud in fact, it is not sufficient to allege in the notice of special matter, facts from which an inference of moral fraud may be drawn. The alleged fraud should be charged in the notice.

Covenants are to be construed dependent or independent of each other, according to the intention of the parties, and the good sense of the case; and technical words should give way to such intention.

A. being indebted to B. in the sum of five thousand one hundred and seventy dollars and forty cents, for tallow, for which he had given eight promissory notes of different dates, for different sums, payable at different times, gave to B. his bond for five thousand dollars, payable in one year from its date, accompanied by a mortgage on his real estate, and paid him the balance of the debt, one hundred and seventy dollars and forty cents, in cash. On the same day, an agreement in writing was entered into between the parties, by which it was stipulated that B. should pay off and take up all the notes as they became due, and deliver them to A. The agreement contained a covenant on the part of B. to indemnify A. against all claims and demands arising on the notes. The notes all came to maturity before the bond was payable. B., without having taken up any of the notes, which were all protested as they became due, and remained in the possession of different holders at the time of the trial, issued a *scire facias*, on the mortgage: Held, that the bond, mortgage, and agreement, constituted one instrument, and that no recovery could be had on the mortgage.

How far time is of the essence of a contract, and where non-compliance with an agreement at the time stipulated, will be relieved against, and where not.

WRIT of error to the District Court for the city and county of Philadelphia, in a *scire facias* on a mortgage given by Archibald M'Crelish, the plaintiff in error and defendant below, to John

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Pray, whose assignees were the defendants in error and plaintiffs below, dated the 31st August, 1822, to secure a bond, with a warrant of attorney, of that date, for the payment of five thousand dollars, in one year, with interest. M'Crelish and Pray had dealings with each other, and M'Crelish became indebted to Pray in the sum of five thousand one hundred and seventy dollars and forty cents, for tallow, delivered to him by Pray, for which he gave him eight promissory notes, of various dates and *various amounts. These notes being drawn in favour of [*27] Pray, were indorsed by him, and discounted by different banks and by others. On the 31st of August, 1822, M'Crelish gave Pray the bond and mortgage, on which suit was brought, for five thousand dollars, payable in one year, with interest, and at the same time, M'Crelish paid to Pray, the balance of one hundred and seventy dollars. The parties on the same day, entered into the following agreement:—

“Whereas, Archibald M'Crelish, of the city of Philadelphia, tallow chandler, has this day executed to the subscriber, a mortgage, bond, and warrant of attorney, conditioned for the payment of five thousand dollars, in one year from the date thereof, with lawful interest; and whereas, the said mortgage and bond were given to secure the payment of sundry promissory notes, drawn by the said Archibald M'Crelish, in favour of the subscriber, as follows:—

One note dated July 15, 1822, at 60 days, for	\$750 00
One “ “ 22, “ 60 “	750 00
One “ August 2, “ 90 “	500 00
One “ “ 3, “ 60 “	870 46
One “ “ 13, “ 60 “	400 00
One “ “ 28, “ 60 “	400 00
One “ “ 29, “ 60 “	600 00
One “ “ 30, “ 20 “	900 00

All of which are indorsed by the subscriber, and have either been discounted in bank, or negotiated: Now, know all men by these presents, that I, John Pray, in consideration of the said mortgage and bond, do for myself, my executors and administrators, warrant and agree to, and with, the said Archibald M'Crelish, his executors and administrators, to pay off and take up all the said notes, as they become due, and to deliver the same to the said Archibald, his executors or administrators, and further to indemnify the said Archibald, his executors or administrators, from all claims and demands whatsoever, which may be made by any person or persons for the payment of the said notes, or any of them, or any part thereof hereby agreeing fully

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and absolutely to indemnify and discharge the said Archibald, his executors and administrators, from all claims and demands arising on the said notes. The said Archibald is to pay the sum of one hundred and seventy dollars and forty cents, being the difference of the amount of the said mortgage and bond and the said notes. In witness, &c., 31st of August, 1822.

JOHN PRAY, [L. s.]

The property mortgaged was proved to be worth about six thousand dollars, and was incumbered with two prior mortgages, amounting to two thousand six hundred dollars.

On the 18th of September, 1822, the first of the above-mentioned notes, for the payment of seven hundred and fifty dollars, fell due, but Pray, being unable to take it up, it was protested by the Mechanics' Bank, who held it. The nine hundred dollars were to become due on *the 22d September, 1822. [*28] On the 21st of September, 1822, Pray was compelled to make an assignment to the plaintiffs, Caleb Churchman and Anthony Taylor, of all his estate, to pay his creditors. The assignment contained the following clause: "And provided further, and it is hereby expressly declared and agreed, that a certain bond, conditioned for the payment of five thousand dollars and mortgage, bearing date on the 31st of August, 1822, for securing the payment thereof, given and executed by Archibald M'Crelish, to the said John Pray, and all the moneys which shall be recovered and received by, and from the same bond and mortgage, shall be, and they are hereby specially and exclusively appropriated and appointed to and for the payment and discharge of the following notes, drawn by the said Archibald M'Crelish, and indorsed by the said John Pray, the said bond and mortgage having in fact been executed and given to secure the payment of the said notes; that is to say." (Here the notes above mentioned were enumerated.)

All the notes remained unpaid, and in the hands of the banks, and others, and were duly protested, and with their protests were given in evidence on the trial, having been produced by the holders who claimed the fund under the assignment.

On the 11th of November, 1822, the defendant, M'Crelish, assigned all his estate to Jeremiah Boone, and others, in trust, to pay certain of his preferred creditors in the first instance, and not the note holders.

The defendant, under the plea of payment, gave notice, that he would give in evidence the above-mentioned agreement, by Pray, and also, that it was understood and agreed by the parties, that Pray was to take up the notes specified in the agreement, as they became due, in order to enable M'Crelish to go on

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with his business; that in consequence of Pray's default in taking up the notes, they were protested, suits instituted against M'Crelish, on some of the notes, his credit destroyed, and finally, on the 10th of November, 1822, he was compelled to make an assignment to Boone and others, in trust for his creditors. The defendant on the trial gave no evidence of any agreement, besides the one in writing above mentioned, nor any evidence to support his notice, except the record of a suit in the District Court by the Bank of the United States, against M'Crelish, to December Term, 1822, No. 169, on the note for seven hundred and fifty dollars, dated the 22d of July, 1822, at sixty days, on which judgment was entered at the April Term, 1825.

The defendant, propounded several questions to the court, the answers to which were assigned for error.

The court was requested to charge the jury:—

1. That unless Pray complied with his agreement, as specified in the paper of the 31st of August, 1822, the plaintiffs cannot recover.

* To which the court answered:—

I consider the payment of these notes but part of the consideration *and when part of a consideration fails and part does not fail, the mortgage is not entirely void. In con- [*29] sequence of his not complying with his covenant to take up the notes, it would not defeat the action altogether, but whatever damages M'Crelish has sustained, should be deducted.

2. That the agreement of Pray to take up the notes as they became due, and deliver them to M'Crelish, being the consideration of the mortgage, he was bound to take them up and deliver them, and unless he has done so, the plaintiffs cannot recover.

Answer of the court. The taking up the notes was not altogether the consideration of the mortgage, and Pray's failure to do so, does not defeat the action altogether.

3. That in order to enable the plaintiffs to recover in this action, they are bound to show they have paid and taken up the notes.

Answer of the court. This question is answered by the preceding remark.

4. That if the jury believe John Pray concealed his inability to comply with his agreement, to pay said notes at maturity, and thereby induced M'Crelish to give the mortgage, the plaintiffs cannot recover.

Answer of the court. If notice of special matter to this effect had been given, and evidence in support of it, I should be of opinion, that the plaintiffs could not recover. But as the defendant gave the mortgage as a fund to raise money to pay the

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notes, the mere inability to pay or raise the money, could not be evidence of fraudulent concealment. I however think that the point could not fairly arise, under the notice of special matter.

Broom and Binney for the plaintiff in error.—The bond, the mortgage, and the agreement, by which Pray stipulated to take up the notes of M'Crelish, bearing the same date, executed at the same time, and relating to the same subject-matter, constitute one instrument. They provide, that as the notes shall become due, they shall be taken up by Pray and delivered to M'Crelish. The object of the arrangement was, not to enable Pray to raise money by means of the mortgage, for the purpose of paying the notes, but that he should pay them out of his own funds, and be ultimately secured by the mortgage. The mortgaged premises could not have been looked to as the source from which payment was to be made, for the notes were to be taken up as they became due, and the last of them was to become due before the 1st of November, 1822, while the bond was not to become due until one year from the 31st of August, 1822, and no procedure could be had upon the mortgage until the expiration of a year and a day from that period. The fund, therefore, could not be realized until after the notes were payable. If the object had been to raise money on the property, there would have been no occasion to make Pray part of the machinery of the arrangement. The money could have been raised without his intervention, and would have passed immediately into the hands of [*30] M'Crelish; nor was he under any obligation arising from his debt for tallow, which was the consideration of the notes, to secure Pray by a bond and mortgage. The object of M'Crelish in giving those securities, was to preserve his credit, by providing against the dishonour of his notes. In no other manner could he derive any benefit from the arrangement. M'Crelish, at the time the bond and mortgage were given, owed Pray nothing. The notes had been passed away, were in the hands of various holders, and had not become due. M'Crelish, therefore, could gain nothing by giving a security merely to Pray, and he was under no obligation to do so. The introduction of the note holders or the assignees of Pray, does not alter the case, as they derive title through him, and have no other rights than his. The true construction of the agreement then is, that the notes were to be taken up as they, from time to time, became due, in order to save the credit of M'Crelish, and enable him to go on with his business. To go back to the original consideration of the notes, and insist that it was the duty of M'Crelish to give the mortgage to secure the debt for tallow, is an error. There

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was no reason why this debt should not be preferred. The punctual payment of the notes alone could have led him to the arrangement, and the failure on the part of Pray to perform the condition on which the mortgage was given, was in its consequences, ruinous to him. It was not an injury which could be made up in damages. Time, therefore, was of the essence of the contract, and did not admit of compensation. Wherever time is material, the act stipulated to be performed, must be performed within the time prescribed, or the contract is vacated. *Bennett v. Lynch*, 1 John. Ch. R. 370. Here nothing was done by Pray in fulfilment of his part of the contract. Not a note has been taken up either by him or his assignees; on the contrary, the Bank of the United States, the holders of one of them, have proceeded to judgment on it, and thus bound up all M'Crelish's other property. Not a step has been taken to entitle Pray to come into a court of equity, and ask a specific performance of the agreement. Equity would not permit him to enforce the mortgage, leaving it entirely uncertain whether M'Crelish will ever derive any advantage from it. If he is bound to do anything to entitle himself to the benefit of the mortgage, equity will never decree specific performance, unless he does what he is bound to do. 1 John. Ch. R. 282.

Instead of charging the jury that the failure of Pray to take up the notes as they became due, was a forfeiture of his right to avail himself of the mortgage, the court below refused even to submit the question of time to the jury, instructing them that payment of the notes was only part of the consideration of the mortgage, and that the injury sustained by M'Crelish, in consequence of their non-payment, might be compensated by damages. This was clearly not a case of divided consideration and part performance. M'Crelish was to get nothing but the punctual payment of his notes. This was the single, undivided consideration. No one can be insensible of the importance *it is to a trader to have his notes punctually taken up. If [*31] a single one remains unpaid, his credit is gone; he is ruined, and it is impossible to estimate the damage. If they are paid immediately after they become due, the evil is not cured, and the dishonour of one is as disastrous in its consequences, as that of twenty. Where the breach of an agreement, at the prescribed time, frustrates all the designs of the party, time is of the essence of the contract and admits of no compensation. If the notes had been lying over when the mortgage was given, the case might have presented a different aspect; but as it was, to leave a single note unpaid at maturity, destroyed the whole arrangement. In what situation is M'Crelish placed, if Pray, or his assignees can recover, in the present state of things? His

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estate is taken from him, and his notes are still outstanding, and he may be sued on all of them, as he has already been on one. If the note-holders have any existence in the cause, their conduct has destroyed their claim. How can they ask for the benefit of this security, when they have permitted M'Crelish to be dishonoured—and one of them has actually proceeded to judgment against him? But the security was evidently not intended to inure to the benefit of the note-holders. The bond could not be rendered available until the expiration of nearly a year, and the mortgage not until a year and a day after the bond became due, and in the meantime, the notes were to be taken up by Pray. The note-holders had nothing to do with the security. It was given for the ultimate security of Pray, who was to pay them out of his own funds. They cited *Mackey v. Brownfield*, 13 Serg. & Rawle, 239; *Bennett v. Lynch*, 1 John. Ch. R. 370; 1 Fonb. Eq. 436, b. 1, c. 6, s. 14; *Montague v. Tidcombe*, 2 Vern. 5, 19; *Lawrence v. Blackford*, 2 Vern. 457; *Thompson v. M'Clenachan*, 17 Serg. & Rawle, 115; *Pordage v. Cole*, 1 Saund. 320, n. 4; *Gainsford v. Griffith*, 1 Saund. 60; 1 Russell, 377; 1 Simon & Stuart, 590.

Admitting that by the true construction of the agreement, Pray was not bound to take up the notes as they fell due, to save the credit of M'Crelish, there, nevertheless, could be no recovery upon the mortgage while the notes were outstanding. There is nothing to prevent suits from being instituted upon them, or an execution from being issued upon the judgment already obtained on one of them. The want of equity in attempting to recover upon the mortgage, without taking a single step towards a compliance with any of the conditions on which it was given, is too palpable to be countenanced. If this court separate the condition from the bond itself, the consequences will be frightful; M'Crelish loses his property, and may nevertheless be compelled to pay the notes. If by a future surrender of the notes, a release of the judgment and indemnity for the injury sustained, full justice can be done under the contract, it must be on another trial, and of course, this judgment must be reversed.

If when Pray received the mortgage, he intended not to pay the notes, he perpetrated a gross fraud, and of course, there can be no recovery on an instrument thus obtained. It was of the [*32] utmost consequence, *therefore, to M'Crelish, to show that when the mortgage was given, Pray either misrepresented or concealed his situation, and for this purpose it was necessary to show what his actual situation was; but the court below refused to charge the jury on this point, as the defendant's counsel requested, on the ground that under the

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notice of special matter given in the cause, such a defence could not be set up. This defence had nothing to do with the notice of special matter. The defendant had a right to any inference he could draw to the jury, from the evidence before them. The object of such a notice is not to cripple and restrain the effect of evidence already given, but to prevent the introduction, by surprise, of evidence, which the plaintiff is not prepared to rebut. The defendant had a right to show from the evidence, that Pray, by concealment, trick, or fraud, had induced M'Crelish to enter into the arrangement. The law is well settled that if the court charge in such a manner as to deprive a party of the benefit of such a charge as ought to have been given, it is error; and this was done by the court below in the present instance.

T. Sergeant and Chauncey for the defendants in error.—One fact lies at the foundation of this case, which must have a material influence on its decision. The notes to secure the payment of which the mortgage was executed, were given for the *bona fide* debt of M'Crelish, who being largely indebted to Pray for tallow, gave his notes for five thousand dollars, and paid the residue in cash. These notes Pray had discounted, and to secure the ultimate payment of them, the mortgage was given. It was nothing more than the ordinary case of a debtor giving a security for his own debt, or rather providing a fund out of which it should be paid. The mortgaged premises were proved on the trial to be worth but six thousand dollars, and were subject to two other mortgages, amounting to two thousand six hundred dollars, so that the fund was insufficient for the purpose for which it was designed. The mortgage was, from its nature, assignable, and Pray having assigned it for the purpose of raising a fund for the payment of the notes, the plaintiffs below, who are his assignees, come into the court upon the mortgage, in order to apply the proceeds to the purpose for which it was assigned. The action, therefore, is for the benefit of the note-holders, who are the real plaintiffs, and the court will consider the real parties as well as the equity of the case. If, as is contended on the other side, the agreement controls the mortgage, it does not follow that the mortgage is vacated, if the notes have not been taken up at the day mentioned in the agreement. The agreement consisted of three parts. 1st.—An acknowledgment by the mortgagee, accepted by the mortgagor, that the mortgage was given to secure the payment of the notes. 2d.—A covenant on the part of the mortgagee, that he would take up the notes as they became due, and deliver them to the mortgagor. 3d.—A covenant to indemnify

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[*33] nify the mortgagor against all claims founded *upon the notes. The leading consideration of the whole arrangement was to provide a fund for the note-holders. All the others were subordinate to it. Indemnity to M'Crelish was not, as the opposite argument supposes, the leading consideration. Properly speaking, it was not any part of the consideration, but rather an independent, personal covenant, not on technical, but substantial grounds. Personal indemnity is sometimes better than real security, and M'Crelish might have preferred it, but if it fails, it does not give him the right to take back the mortgage, unless there is an express stipulation to that effect, which was not the case. The agreement was not a defeasance of the mortgage nor is there a word in it which goes to invalidate it, if the notes should not be taken up as they become due. The covenant of indemnity, negatives such an idea. To consider the mortgage as vacated in the event of the notes remaining unpaid, is to defeat the very object for which it was given. If M'Crelish had paid the notes himself, it would have been a different matter; but no court has ever declared a contract like this void in consequence of the failure of a collateral covenant. To argue that there can be no recovery of the fund provided for the payment of the notes, until the notes have been paid, is to require an impossibility. The very object in putting the mortgage in suit, is to obtain the means of carrying the arrangement into effect. It cannot be done except through the medium of the mortgage, yet the defence would take from the plaintiffs below, the only means by which the agreement can be executed. The same answer may be given to the position taken on the opposite side, that supposing it was not necessary under the agreement, that the notes should be taken up as they became due, they must at all events be paid and surrendered before the institution of a suit upon the mortgage. If the plaintiffs had received the fund, the notes would have been paid and surrendered, but without the fund provided for their payment, how can they pay them? The fund is required for the payment of the notes, and of course they cannot be tendered until the fund is rendered available. If, however, M'Crelish has any equitable claim to receive the notes before judgment is obtained on the mortgage, that obstacle may easily be removed. The plaintiffs are now ready to surrender the notes on obtaining judgment on the mortgage. Where there is a legal objection, it must be removed before the institution of a suit; where it is an equitable one, it may be removed at any time, even during the trial. This is a well settled distinction.

As for the delay of the payment of the notes beyond the time prescribed in the agreement, it forms no objection to the plain-

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tiff's recovery. Time can almost always be compensated. This has become almost an universal rule, and the contrary is the exception. No court of equity ever inflicted a forfeiture for non-compliance at the day. *Decamp v. Feay*, 5 Serg. & Rawle, 323; *Bellas v. Hays*, Ib. 427. The defence is not that the debt intended to be secured, is not honestly due, or that it has been satisfied, and in a court of equity a *defence cannot be set up, except upon some such ground. The defence is [*34] merely that the creditor did not take up the notes at maturity, without any attempt to show that the debtor sustained any damage, or even suffered any inconvenience from the want of a strict compliance with the agreement. If M'Crelish had suffered damage, he might have sued upon the covenant, even before the mortgage became due, and he may now sue if he thinks he is injured. There was no failure of the consideration of the mortgage, for it was given to secure the payment of a debt, and the debt has not been paid. If it had been paid by M'Crelish, the consideration would have failed. In equity, the rule for the construction of covenants, is the same as at law. There is no difference in the manner in which they are treated. The meaning of the parties at the time the covenant was entered into, must govern, and this meaning can only be collected from the language they have used. But here the court is called upon to say what the parties have not said, and make the covenants mutual and dependent, though the language of the parties is opposed to it.

The notice of special matter, was no indication of the defendant's intention to prove what he afterwards alleged, and he has no reason to complain of the court below, for saying that the defence attempted to be set up, did not arise upon the notice given. He was not deprived of the benefit of any evidence of which notice was given; no fraud was alleged in the notice, or attempted to be proved on the trial. All the facts stated in the notice, were given in evidence, so far as they could be proved, and thus the defendant had the full benefit of his notice. His error was in attempting to set up a defence which his notice did not cover.

ROGERS, J., (after stating the case,) delivered the opinion of the court, as follows :—

We agree fully with the court, that this case must be taken divested of all considerations arising from the allegation of fraud. The inability to pay the notes, as they became due, was not evidence of fraud, nor, on the other hand, was fraud fairly inferable from proof of the fact, that at the time the mortgage was executed the property was previously incumbered to an

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amount which reduced the value of the security below five thousand dollars. The parties must be supposed to have entered into the contract with a knowledge of all the circumstances, and if they intended to insist on fraud, some evidence should have been given other than the written testimony which was submitted to the jury. If the defendant intended to insist on fraud in fact, it should have been charged in his notice of special matter, otherwise the plaintiff might be taken by surprise. It is not sufficient to allege facts, from which an inference of moral fraud may be drawn, as has been heretofore decided by the court. The object of special notice is to put the plaintiff on his guard, that his attention may be drawn to the defence, on which the defendant relies. There is nothing in this notice by which the plaintiff [*35] could be apprised that the defendant intended to charge him with fraud. We think with the District Court, that the defendant's point could not fairly arise under the notice of special matter. This, however, is a minor defect, which might be easily remedied on another trial.

The only difficulty arises in the charge of the court, on the three first propositions of the defendant's counsel, all of which may be properly considered under one head.

I cannot say that I exactly comprehend the meaning of the court, when they declare, that they consider the payment of the notes but part of the consideration. This is not explained in the charge, and we have to regret that we have not a more full report on this head, as this appears to be made the hinge upon which the whole cause turns. If this had been the case, when part of the considerations failed and part did not fail, the mortgage would not be void. When a covenant goes only to part of the consideration on both sides, and a breach of such covenant may be paid for in damages, it is an independent covenant, and action may be maintained for a breach of the covenant on the part of the defendant, without averring performance in the declaration. 1 Saund. 320, note 4.

The bond, and mortgage, and agreement, being executed at the same time, and in reference to the same subject-matter, must be taken as one covenant. 2 Vern. 459, and 17 Sergeant & Rawle, 115. To discover the intention of the parties concerned, is the chief object, and in effecting this we have not to encounter any technical difficulties. For covenants, &c., are to be construed to be either dependent or independent, of each other, according to the intention and meaning of the parties and the good sense of the case; and technical words should give way to such intention. 1 Saund. 320, note 4. On the 31st August, 1822, the time the agreement was made, M'Crelish was indebted to Pray five thousand one hundred and seventy dollars, for which

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he had given him his notes, of different dates, different amounts, and payable at different times. It was a business transaction; the ordinary case of debtor and creditor. M'Crelish was under no obligation, legal or moral, to give additional security for payment of the money due. We are then to seek for the motive which induced M'Crelish to give Pray, or if you please, the holders of the notes, such security for the money; and this reason, which forms the consideration of the contract, is given in the agreement itself. M'Crelish agrees to give to Pray the mortgage and bond in question, and the sum of one hundred and seventy dollars and forty cents, in consideration whereof Pray stipulates that he will pay off and take up all the notes, as they become due, and deliver the same to M'Crelish. It is not denied that M'Crelish performed all his part of the contract to the letter; that is, he gave his bond and mortgage, and paid the money, according to contract. The plaintiff sues out a *scire facias* on the mortgage, which is in substance calling on the defendant to show cause why the property should not be sold for payment of the notes, which it was intended to secure, and the *single question will be, whether the plaintiff has per- [36] formed his part of the contract. Are the covenants, in the agreement, conditions, and dependent, in which the performance of one depends on the prior performance of the other, and therefore, till the prior condition be performed, the other party is not liable to an action on his covenant? *Kingston v. Preston*, referred to in 2 Doug. 689. Or are they mutual and independent, where either party may recover damages from the other, for the injury he may have received by a breach of the covenants in his favour, and where it is no excuse for the defendant to allege a breach of the covenants on the part of the plaintiff? That no particular words are required to create either a covenant or a condition, is perfectly clear; and it is also immaterial in point of construction, whether the clause be placed in the instrument prior or posterior to others. There are indeed some words, on which conditions precedent usually arise, such as, for instance, *ita quod, sub conditione, quod si contingat*. *Lock v. Wright*, 1 Str. 569; s. c. 8 Mod. 40; *Peters v. Opie*, 2 Saund, 350; Co. Lit. 204 a, 203 c; 2 L. Ray. 766; Com. Dig. title, Condition. And in some instances the words shall be construed to be both a covenant and a condition; as if one leases for years by indenture, provided always, and it is covenanted and agreed, that the lessee shall not alien. This is a condition by force of the provision, and a covenant by force of the other words; Co. Lit. 203, b; 2 Mod. 74; 2 Co. 72, a, *Cromwell's case*; Cro. E. 242, *Simpson v. Tetterell*. But the courts at the present day disregard technicalities, and notice such words so far only

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as they disclose, and are evidence of the intention of the contracting parties. Platt on Covenants, 72. It is said, that this is a suit brought by the assignees of Pray, under the special clause in his assignment for the benefit of the holders of the notes. It may be safely admitted, that they stand in the place of Pray, but surely no person can contend, that they are in a better situation. Whether the parties to the agreement were particularly anxious about the security of the holders of the notes, admits of doubt. Pray had an eye to his eventual liability, in case the drawer should be unable to take up the notes at maturity. This was his motive; but be this as it may, the court would give the language of the agreement an extended signification, so as to embrace the holders of the notes, and give them the advantage of the security. I am willing to allow the plaintiffs the benefit of the position, that the parties are substantially the holders of the notes. It is in truth a contest for the fund, between different classes of creditors, and in this view equally meritorious in the eye of the court. Still the question recurs, what is the meaning of that part of the contract, in which Pray agrees to pay off and take up all the said notes as they become due, and deliver the same to M'Crelish. It is not pretended that Pray, or any other person, paid the notes as they became due. On the contrary, the notes were regularly protested for non-payment, and on one of them suit was brought and prosecuted to judgment. It is not alleged that the notes were delivered to M'Crelish, nor was [*37] there an offer to deliver them until the time of trial. It is, however, said, that the mortgage, &c., were given to raise money for the purpose of paying the notes as they became due, and that the failure in payment arose from a deficiency in the value of the property. But this is said without any evidence whatever, and in opposition to the common sense of the transaction. I can perceive no motive which could induce M'Crelish to make such an arrangement. If the intention was to raise money on the mortgage, so as to meet the notes when they became due, this could have been as well effected, for anything that we know, by M'Crelish as by Pray, and that without the risk to which he must be exposed by placing in the hands of Pray the whole amount raised on the mortgage, which Pray might, or might not, faithfully apply to the objects of the trust. They could not have looked to a sale of the property, as that could not be done under the mortgage, until after all the notes became due. Besides, if such was the intention, as has been contended, it does not appear that any effort was made to raise money on the security of the mortgage. If we understand this agreement as providing Pray with a real security, and as secur-

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ing to M'Crelish the punctual payment as they became due, we have considerations presented sufficiently powerful to account for the arrangement. M'Crelish's credit depended on the payment of the notes at the day. The dishonour of the bills necessarily destroyed his credit. And so certain was this effect produced, that M'Crelish shortly after assigned for the benefit of his creditors. To prevent this, was the principal reason for entering into the contract. But, it is said, that in equity, time is not material, and in general it is not. But when it is the obvious intent to make time material, equity will not relieve, and that is the case here. The injury arising from a non-payment at the day, of these negotiable securities, it may be difficult to estimate, nay, in some instances, impossible. In a mercantile community, punctuality is of the utmost importance, and the covenant might be viewed in relation to the subject-matter, and under all the circumstances attendant upon it. Although the agreement contains a stipulation for an indemnity, this was intended to give a remedy, when the injury was of such a nature as to require a larger compensation in damages than the amount of the value of the notes. The clause may also be relied on to show the importance which M'Crelish attached to a punctual performance of the contract at the day. It must be borne in mind, that no one of the notes was ever paid, and whether if such a payment had been made, it would have been in part performance of the contract, it is unnecessary to decide. Although it has been intimated, in some of the cases, that time could not be made of the essence of the contract, even by a positive stipulation of the parties, there has been no decision to that effect; but in other, and in later cases, it has been admitted that parties may make time of the essence of agreement, and whether they have done so must depend on all the circumstances. 1 Russel, 377; 1 Simon & Stuart, 590. In **Benedict & Lynch*, Chancellor Kent, [*38] with his usual perspicuity, reviews all the cases in this branch of equity. He adopts the opinion of Lord Loughborough in *Lloyd v. Collit*, 4 Bro. 469, who observes that there is nothing of more importance, than that the ordinary contracts between man and man, which are so necessary in their intercourse with each other, should be certain and fixed, and that it should be certainly known, when a man is bound and when not. There is a difficulty to comprehend how the essentials of a contract should be different in equity and at law. It is one thing to say that time is so essential, that in no case in which the day has by any means been suffered to elapse, the court would relieve against it and decree performance; the conduct of the parties, inevitable accidents, &c., might induce the court to relieve. But it is a different thing to say, the appointment of a day is to have

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no effect at all, and that it is not in the power of the parties to contract, that if the agreement is not executed at a particular time, they shall be at liberty to rescind. This is not, it is true, the case of an express stipulation to rescind the contract, provided the notes were not taken up and delivered at the day, yet there is no mistaking the intention of the parties to provide for the faithful, literal, and punctual compliance with the contract, It was an object of the greatest importance to M'Crelish to preserve his credit, which could only be done by preventing the dishonour of his bills. Had the notes been paid at the day, but not delivered, that would have been a case of a part performance, and the failure to deliver the bills might have been compensated in damages. But not so where there has been an entire failure on the part of the plaintiffs. The principle seems to be firmly established, that time may be a circumstance of decisive importance, but that it may be waived by the conduct of either party ; that it is incumbent on the plaintiff, whether at law or in equity, to show that he has used due diligence in the performance of his part of the contract, or that if he has not, his negligence arose from some just cause, or has been acquiesced in ; that it is not necessary for the defendant to show any particular inconvenience ; it is sufficient if he has not acquiesced in the negligence of the plaintiff. It is not pretended that the plaintiffs performed their part of the contract at the time, nor has it been shown that the negligence arose from any just cause, or that it has been acquiesced in by the defendant. They seek every benefit from the contract, without anything being done on their part from which M'Crelish could receive the slightest possible advantage. His notes have been dishonoured, and he has been compelled to assign his property for the benefit of his creditors.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 5 Wh. 62 ; 3 W. & S. 431 ; 4 W. & S. 532 ; 4 Barr, 407 ; 1 J. 380 ; 1 Par. 426 ; 5 C. 275 ; 7 C. 503 ; 10 C. 457 ; 1 Wr. 478 ; 6 S. 85 ; 7 S. 71 ; 10 S. 306 ; 12 N. 527, s. c. 9 W. N. C. 26 ; 15 N. 239.

Cited by the Court, 5 W. 517 ; 1 H. 245.

*[PHILADELPHIA, JANUARY 28, 1833.]

[*39]

Case of Jonas Hartman's Estate.

APPEAL.

Where a person dies intestate, leaving no lawful issue, nor a father, but leaving a mother, and brothers and sisters, seized of real estate which he had from his father, or his father's legal representatives, as a purchaser for value, his mother is entitled to an interest in the estate under the seventh section of the act of the 19th of April, 1794.

Testator by his will directed that on his youngest child coming of age, his executors should sell the whole of his real and personal estate, and divide the proceeds equally between his wife and six children; and by a codicil directed that when his youngest son should be of full age, the estate should be appraised, and his sons, Jonas and Elias, should "have the first choice to accept the same, if they choose to do so." The executors, after the youngest child attained full age, exposed the premises to public sale, when they were struck off to a bidder who failed to comply with his contract; upon which one of the sons, Jonas, who was also one of the executors, agreed to take the estate at the price bidden, which was considered by the executors and heirs as a fair one, and a deed was executed to him by his co-executors. Jonas afterwards died, seized of the estate, leaving no issue, but leaving a mother and brothers and sisters. Held: that his mother was not entitled, under the seventh section of the act of 19th of April, 1794, to an interest in that portion of the estate, which could have descended to him if his father had died intestate, but that she was entitled to an interest in those portions which he acquired as a new purchaser.

THIS was an appeal from the decree of the Circuit Court of *Lehigh* county, affirming the decree of the Orphans' Court of that county, in relation to the distribution of the estate of Jonas Hartman, deceased.

Jonas Hartman died about the year 1829, leaving no issue, but leaving a widow, a mother and brothers and sisters. He was seized at the time of his death of a tract of land in *Lehigh* county, the title to which he derived in the following manner, viz.: Jacob Hartman, the father of Jonas, was seized of the premises, and on the 6th of December, 1815, made his will, which after his decease, to wit, on the 12th of January, 1820, was duly proved. The will contained the following clauses: "It is likewise my will that my said wife, Eve, shall remain in the full possession of my plantation, until she marries, or my youngest child shall come to age, and in case my widow shall not marry again, then as soon as my youngest child then living comes to age, the whole of my real and personal estate shall be sold by my executors, and divided in equal shares between my wife and my six children, Sarah, Jacob, Esther, Elizabeth, Jonas, and Elias, but in case my widow shall marry again, then my personal estate only

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shall be sold, and my widow shall receive what the law will allow her, and no more, and my real estate shall then be sold when my youngest child arrives to age," &c. "And I authorize my executors when my youngest child is of age, to sell my [*40] real estate by public or private *sale, and to make and deliver good titles for the same, and I hereby bequeath my whole estate and the reversion thereof to my six children, Sarah, Jacob, Esther, Elizabeth, Jonas, and Elias, and to their heirs and assigns forever. And after this is so done, my beloved wife Eve, shall have as her dower or *ausbehalt*, as long as she remains my widow, the lower room and the cellar under the room," &c., &c. The testator appointed his wife Eve, his son-in-law, Jacob Seipel, and his son Jonas, his executors.

Subjoined to the will was a paper without date or signature, in the handwriting of the decedent, Jacob Hartman, but not proved with the will, in which he says, "And I again recommend to my executors that when the youngest child will be of full age, that then my plantation shall be appraised, and Jonas and Elias shall have the first choice to accept the same if they choose to do so."

"N. B. It is also my will that my wife Eve's share or part, which she takes equally with my six children, shall remain on said plantation as long as she shall be my widow, and she shall receive annually the interest thereof," &c. "And it is my will that my wife Eve, shall take a mortgage or security on my plantation for the time she shall remain my widow, and have the same recorded," &c.

The testator died in December, 1819, and in 1825, Elias, the youngest child, attained his full age.

The land was exposed to public sale by the executors on the 4th of February, 1826, and struck off to John Schweitzer, at fifty-six dollars and one cent an acre, and he neglecting to comply with his contract, Jonas Hartman took the land at Schweitzer's bid, which was considered by the executors and heirs a fair price for it.

On the 8th of April, 1826, Eve Hartman and Jacob Seipel, two of the executors, executed to Jonas Hartman, their co-executor, a deed for the premises, subject to the payment of the interest of three hundred and twenty-nine dollars and thirty-one cents, annually to Eve Hartman, during her life, and of the principal to the heirs of Jacob Hartman, after her decease. The residue of the price, amounting to one thousand nine hundred and seventy-five dollars and fifty-five cents, was paid or accounted for to the executors, and distributed among the six children of Jacob Hartman, of whom Jonas was one.

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On the 14th of September, 1828, Eve Hartman married John Hummell.

Jonas Hartman having died without issue, but leaving a mother, brothers, and sisters, on petition of some of the heirs, an inquest was held under the intestate laws, and the estate being incapable of division, it was appraised. The inquisition was confirmed by the court, and the property accepted by one of the heirs. The question which then arose was, to whom the appraised value should be paid.

The Orphans' Court appointed an auditor to make distribution, who reported as follows :

*" Valuation money,	\$3,200 00	
Deduct expenses of inquisition, . . .	\$37 85	[*41]
Amount due by Jonas Hartman, to the estate of Jacob Hartman, deceased, (on account of purchase-money,)	146 22 2-7	
Interest due Eve Hummell, late Eve Hartman, from September 14, 1828, to April 1, 1830,	30 57 5-7	
Auditor's wages,	3	217 65
		<hr/>
		2,982 35
Amount of a lien on the land in favour of Eve Hummell, subject to which the land was accepted, . .		329 31
		<hr/>
		2,653 04"

This sum of two thousand six hundred and fifty-three dollars and four cents, the auditor directed to be distributed as follows :—

" A bond to be given to John Schweitzer, and Margaret, his wife (the widow of Jonas Hartman), for one thousand three hundred and twenty-six dollars and fifty-two cents, being one-half of the net valuation money, the interest thereof to be paid to her, during life, and the principal at her decease.

" Three hundred and two dollars and seventy-five cents, the amount of Jonas Hartman's share of his father's estate, to be immediately distributed among his brothers and sisters.

" One thousand and twenty-three dollars and seventy-seven cents, the residue of the net valuation money to remain in the premises, the interest thereof to be paid to Eve Hummell, late Hartman the mother of Jonas, during life, and the principal at

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her decease, and bonds to be executed by the acceptant of the real estate accordingly."

This report was read and confirmed, *nisi*, on the 13th of May, 1831. On the 14th of May, 1831, exceptions were filed by the widow, and the mother of the deceased, and by Jacob Seipel, one of the heirs, and rules were granted to show cause why the report should not be set aside or corrected.

The exception filed on behalf of the widow of Jonas Hartman, was, "That the auditor had not directed a bond to be given to John Schweitzer, and Margaret, his wife, and the survivor of them, conditioned for the punctual payments of the interest of the one thousand three hundred and twenty-six dollars and fifty-two cents, stated on said report as the half of the said Jonas Hartman's estate; the said Margaret Schweitzer, late Margaret Hartman, being widow of the said Jonas Hartman, who left no issue."

The exception filed on behalf of the mother, was, "That the auditor has directed a bond to be given to the heirs and legal representatives of Jacob Hartman, the father of the said Jonas [*42] Hartman, *deceased, payable at the death of Eve Hartman, now Eve Hummell, widow of the said Jacob, and mother of the said Jonas, the interest to be paid annually to the said Eve, during her natural life, counting from April 1, 1830, for one thousand and twenty-three dollars and seventy-seven cents: Whereas, there should have been a bond given to John Hummell, and Eve, his wife, late Eve Hartman, in the same way to enforce payment of the yearly interest to the said Eve Hartman, the widow."

The exception filed on behalf of Jacob Seipel, married to a sister of Jonas Hartman, was, "That the auditor erred in directing a bond to be given to Eve Hummell, late Eve Hartman, who is the mother of Jonas Hartman, deceased, for the sum of one thousand and twenty-three dollars and seventy-seven cents."

On the 2d of September, 1831, the Orphans' Court made the following decree: "That the account reported by John Rice, auditor, be corrected in this, that instead of a bond being given to Eve Hummell, formerly Eve Hartman, widow of Jacob Hartman, deceased, and mother of the said Jonas Hartman, deceased, for the sum of one thousand and twenty-three dollars and seventy-seven cents, that the bonds be given for the said sum of one thousand and twenty-three dollars and seventy-seven cents, to the brothers and sisters of the said Jonas Hartman, as if Jonas Hartman had survived his said mother Eve. The court also decree that a bond be given by the acceptant of the real estate of Jonas Hartman, deceased, to John Schweitzer, and Margaret, his wife, in the penalty of one thousand three hun-

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dred and twenty-six dollars and fifty-two cents, conditioned for the payment of seventy-nine dollars and fifty-nine cents annually on the 1st day of April, counting the 1st day of April, 1831, for and during the natural life of Margaret Schweitzer, widow of said Jonas Hartman, deceased, and that the said acceptants pay immediately to the said John Schweitzer, and Margaret, his wife, seventy-nine dollars and fifty-nine cents, being the interest due at this time, to the said widow of Jonas Hartman, deceased. And the court also decree that the said acceptant of the said real estate, give bond to the brothers and sisters of the said Jonas Hartman, deceased, (naming them,) in the penalty of two thousand six hundred and fifty-three dollars and four cents, conditioned for the payment of one thousand three hundred and twenty-six dollars and fifty-two cents, on the day of the death of Margaret Schweitzer, late Margaret Hartman, widow of Jonas Hartman, now deceased, and the report thus corrected, is confirmed by the court, and the exceptions dismissed."

From this decision of the Orphans' Court, John Hummell, and Eve, his wife, appealed to the Circuit Court, and filed their exceptions.

In the Circuit Court, his honour Judge Huston, without argument, affirmed the decree of the Orphans' Court, in order to bring up the whole case before the Supreme Court, without prejudice, and the appellants appealed to this court.

*The following reasons for the appeal were filed :

1. That under the intestate laws of Pennsylvania, the [*43] mother of the deceased, (who died intestate without issue, but leaving a wife, a mother, and brothers and sisters,) was entitled to enjoy during life, the income of one-half of the net proceeds of the real estate of the deceased, after payment of his debts, and the court should have so decreed in this case.

2. That the real estate of the deceased, or the valuation-money thereof, should not have been decreed to the widow and brothers and sisters of the deceased, to the exclusion of the mother, such estate having been acquired by the intestate by purchase, in the strict sense of the term, in his lifetime.

J. M. Porter for the appellants, referred to the act of the 19th of April, 1794, sec. 4, 7, 8 ; *Purd. Dig.* 402, 403 ; *Ferree v. The Commonwealth*, 8 *Serg. & Rawle*, 312 ; *Stoolfoos v. Jenkins*, 8 *Serg. & Rawle*, 167 ; *Fogelsonger v. Somerville*, 6 *Serg. & Rawle*, 267 ; *McCullough v. Wallace*, 8 *Serg. & Rawle*, 181 ; *Simpson v. Hall*, 4 *Serg. & Rawle*, 337, 342 ; *Shippen v. Izard*, 1 *Serg. & Rawle*, 222 ; *Bevan v. Taylor*, 7 *Serg. & Rawle*, 397.

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Gibbons and Davis, contra, cited Allison, Executor of Henderson, v. Wilson's Executors, 13 Serg. & Rawle, 332; Toller, 360; 3 Ba. Ab. 30, 31; Nicholson v. Halsey, 1 Johns. Ch. R. 417; 2 Ba. Ab. 304; Lutw. 313; Burke v. Lessee of Young, 2 Serg. & Rawle, 383.

The opinion of the court was delivered by

GIBSON, C. J.—By the fifth and seventh sections of the act of 1794, the father or mother of an intestate succeeds to a portion of the inheritance, where it has not come “on the part of” the opposite parent; but in the eleventh section, which provides for the case of the half-blood, the exception is where “such inheritance came to the said person, so seized, by descent, devise, or gift of some one of his ancestors; in which case all those who are not of the blood of such ancestor, shall be excluded from such inheritance.” The difference in the phraseology, as regards the parent and the half-blood, must have been accidental, for it surely could not be an object to exclude the parent, more than it could be to exclude the issue of such parent, merely because the title was transmitted by the opposite parent to the intestate as the purchaser for value, just as it would have been transmitted to a stranger. Where the transfer is in pursuance of a purchase, in the popular sense, the parties stand in relation to the transaction, not as parent and child, but as vendor and vendee; and there is no reason to exclude the other parent from a portion of the inheritance that would not equally hold in respect of a purchase from a third person. The question then is, whether the intestate here had the estate from his father as a purchaser for value, or by descent, gift, or devise. As regards those portions of it, which would have passed to his brothers and [44] sisters, had his father died intestate, there *can be no question, as they can by no construction be treated as having descended: and on the other hand, having been paid for to the father's representatives, they stand in relation to the question as if they had been paid for to the father himself. The difficulty is in regard to the part that would have descended, had the father died intestate. At the common law, every devisee being a purchaser and the founder of a new stock, the question, in cases like the present, is, whether the estate came by descent or by purchase, technically so called. The rule is, that it shall be treated as if transmitted by descent, wherever the will gives, as regards quantity and quality, though clogged with a condition or incumbrance, exactly what the law would have given: in other words, that incumbering the estate by the will, shall not alter its descendable quality, the law casting it on the heir, notwithstanding the devise to him, merely subject to the charge. Co.

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Lit. 12, b, note 2; *Hedger v. Rowe*, 3 Lev. 127; *Allen v. Heber*, 1 Bl. Rep. 22; *Hurst v. The Earl of Winchelsea*, 2 Burr. 879, and *Clerk v. Smith*, 1 Salk. 241, where *Gilpin's Case*, Cro. Car. 163, is denied to be law. The legislature have thought fit to extend the principle, in favour of the blood of the first purchaser, to a gift or devise; but by the latter word, it was undoubtedly meant to provide only for a testamentary gift; for being coupled in the clause with the word gift, as applicable to a gratuitous disposition of the estate, taking effect in the decedent's lifetime, it shows pretty clearly, that nothing but a gratuity, whether by devise or *inter vivos*, was intended to be provided for. The legislature must, therefore, be supposed to have used the word in its popular sense, as importing a testamentary gift, without intending to exclude either parent or the brothers and sisters of the half-blood, where the arrangement was in fact a testamentary sale. The presumption is a natural one, that had the absolute owner been permitted by prolongation of his life, to dispose of the estate, he would not have excluded persons so near in blood, in favour of more remote kindred, merely because the title, and not the beneficial interest, had been derived from their common ancestor. It is unnecessary to determine here, whether in settling the construction of our statute, we ought to apply the principle of the common law, which merges the equitable in the legal estate, where they have been united for the first time in the person of the decedent, so as to restrain the descent to the line of the latter; but it is not too much to say that it would scarce be deemed applicable to such a case as that of *Nicholson v. Halsey*, 1 Johns. Ch. R. 417. In the case before us, the difficulty arises on what is said to be the main clause in the will, which gave the devisees not an estate in the land, though the descent was broken, but the produce of the land when sold by the executors, which was determined in *Allison v. Wilson*, 13 Serg. & Rawle, 330, and *Morrow v. Brenizer*, 2 Rawle, 185, to be such an interest as is not bound by a judgment; and hence, it might perhaps be contended that the whole was acquired neither by descent nor devise, but by purchase. But by a subsequent clause admitted to have been since proved *as a codicil, and therefore proper to be considered here, [*45] the testator directed the executors to offer the land to Jonas, or Elias, at a valuation. No formal valuation was in fact made, but what is effectively the same, the land was put up at public sale, and taken by Jonas, the intestate, at the highest price bidden. It is only by considering this as a substantial compliance with the will that the title can be considered as available, for Jonas, who was also an executor, could not purchase at his own sale. Having taken directly under the will, he was a

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gratuitous devisee of his own share, but a substantial purchaser of the rest. This principle is in accordance with the decisions that have been made where the whole estate has been decreed to one of the children of an intestate by the Orphans' Court; and the only case which seems to stand in the way of the same conclusion in the case of a devise of the whole to one of the children, on condition of paying an equivalent to the others, is *Reading v. Royston*, 1 Salk. 242, where it was held that a devisee who would have taken but a part of the estate by descent, as in the case of a devise of the whole to the son of a deceased parcener, shall take the whole by purchase, instead of taking a moiety by purchase and a moiety by descent: in other words, that all shall be deemed to have passed by the will. There is, however, no actual discrepance; for in the case before us, the whole is deemed to have passed by the will, and the devisee is supposed to be technically speaking a purchaser of the whole, though not such a devisee of anything but his own portion as was within the contemplation of the legislature. To an interest in that portion, coming as it did, on the part of the father, the mother of the intestate is not entitled; but in respect of the other portions which were acquired as a new purchase, her right is indisputable. It is, therefore, ordered, that the decree of the Circuit Court, and of the Orphans' Court, be reversed, and that the report of the auditor be confirmed: in addition to which it is ordered that a bond be executed to John Hummell, and Eve, his wife, to secure the interest annually payable to her.

Decree accordingly.

Cited by Counsel, 1 Wh. 259; 3 S. 142; 5 S. 66.

Cited by the Court, 10 H. 297; 3 S. 143.

[*46]

*[PHILADELPHIA, JANUARY 28, 1833.]

In the Matter of the alleged Nuncupative Will of Priscilla E. Yarnall, deceased.

APPEAL.

Nuncupative wills are not to be favoured.

To entitle a nuncupative will to probate, the provisions of the law must be strictly complied with, and the absence of due proof of a strict compliance with any one of them is fatal.

The testamentary capacity of the deceased and the *animus testandi*, at the time of making the alleged nuncupative will, must be proved by the clearest and most indisputable testimony; and it must plainly appear from the evidence, that the instrument proposed to be proved, contains at least the true substance and import of the declarations made by the deceased.

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The *rogatio testium* must be at the time the alleged nuncupative will is made, which must be proved by two or more witnesses, who were then present; and it is not enough if the alleged testator declare his will first in the presence of one witness, and afterwards in the presence of another. The requisite number of witnesses must be present, and called on at the same time to attest the will.

A nuncupative will is not good unless it be made by the testator when he is in *extremis*, or overtaken by sudden and violent illness, and has not time or opportunity to make a written will.

Therefore, where the alleged testatrix had been afflicted with a pulmonary consumption for about six months before her death, testamentary declarations, made nine days before her death, during which period, though weak in body, she retained the possession of all her faculties until the last hour of her life, were held, not entitled to probate as a nuncupative will.

THIS case came before the court on an appeal from the decree of the Circuit Court of *Chester* county.

On the 23d of April, 1831, a paper writing purporting to be the nuncupative will of Priscilla E. Yarnall, deceased, was exhibited for probate by Walker Yarnall, a legatee and devisee under the will, in the office of the register for the probate of wills, and granting letters of administration in and for the county of Chester. The register, after having examined the evidence and heard counsel, decreed that the alleged nuncupative will could not be admitted to probate, and dismissed the application. From this decree Walker Yarnall appealed to the Register's Court, who after hearing, affirmed the decree of the register.

The paper offered to the register for probate, was in these words:

"Notes of a verbal will of Priscilla E. Yarnall, who departed this life on the 27th of the 3d month, 1831, committed to writing on the 30th of the same month, by Walker Yarnall.

"On the 18th day of the 3d month, Priscilla E. Yarnall said, that she gave to her uncle, Walker Yarnall, all goods and moneys which belonged to her, and everything that she had or could dispose of, except her bed, &c., and requested or wished her uncle, Walker Yarnall, if all things settled right, to give Robert Frazer, such of her *school books as may be of use to [*47] him; also some spoons which were marked with the initials of Robert Frazer's first wife.

"She gave to Elizabeth Black, her bedsteads, bed, and bedding, and everything belonging to her bed furniture; also, some sheets and coverlids or bedquilts which she believed were at her uncle Robert Pennell's, which she gave her, not as a compensation, but as a kind nurse, and desired that Elizabeth Black should be well paid for attendance and care, besides.

"On the 19th said she had forgot her clock, but would think of it while the family took tea; after tea she said, she did not

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see that she wished the clock taken from her uncle Walker, but he must keep it.

"Same day, 19th, she wished the clothes that were in a trunk in the garret, to be brought to her. She then laid out a crape shawl, and said she wished that to be given to her aunt, Susan Hannum; and silk shawl to be given to Betsey Barton. She then directed her aunt, Elizabeth Yarnall, to give the remainder of her mother's clothes to her aunt, Sarah Meredith; also, requested her aunt, Elizabeth Yarnall, to give her aunt, Sarah Meredith, a bonnet box and two bonnets which were in a closet in her room at Joseph Parry's. She gave her uncle, Walker Yarnall, her horse, and requested that he would not part with it to any person."

"3d month, 27th. A short time before her decease, she said, he is to have them spoons, and Betsey the beds, &c., three blankets and three coverlids. Thee knows what I gave thee, aunt Sally, the clothes and bonnets; thee knows, looking at her aunt E. Yarnall, and uncle Walker knows all about it."

The paper above stated, was indorsed: "Paper offered for probate to the register, as containing the nuncupative will of Priscilla E. Yarnall, April 23d, 1831." It was filed in the register's office, on the 15th day of June, 1831.

Another paper was also offered to the Register's Court, as containing the alleged nuncupative will. This memorandum was taken down by the counsel of Walker Yarnall, in the Register's Court, from the examination of the witnesses. It was as follows:—

"Nuncupative will of Priscilla E. Yarnall, deceased, made on the 17th and 18th days of March, 1831, and republished on the 27th of the same month and year, at the house of her habitation or dwelling, during her last sickness, and in substance as follows—to wit:

"I give to my uncle, Walker Yarnall, all my personal property, except as hereafter excepted.

"To Elizabeth Black, I give my bedsteads, bed, and bedding, and everything belonging thereto; also, three sheets or blankets and coverlids; these articles I give to the said Elizabeth, not as a compensation, but as a kind nurse, and desire that the said Elizabeth shall be well paid for her attendance and care besides. To my aunt Susan Hannum, I give one crape shawl; also, to Betsey Barton one silk shawl, being the same particularly designated by me for them in the presence of Mary James and Elizabeth Black.

[*48] **"To my aunt, Sarah Meredith, I give the remainder of the clothes formerly belonging to my mother; also, one bonnet box and two bonnets, which are now or formerly

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were in a cupboard in the room used by me at Joseph Parry's. And I request that my aunt, Elizabeth Yarnall, deliver these articles to the said Sarah, and I leave all my personal property, and dispose of the same as aforesaid, and desire Mary James and Elizabeth Black, to take notice and remember the same."

This paper was indorsed, "Paper offered to the Register's Court, as containing the nuncupative will of Priscilla E. Yarnall, June 15th, 1831."

It was filed in the Register's Court, on the day last mentioned.

On the hearing before the Register's Court, several witnesses were examined, whose depositions were reduced to writing, in pursuance of the act of assembly of 1705. To understand the case it is necessary that the substance of them should be stated.

Mary James testified that she was acquainted with Priscilla E. Yarnall, who died on the 27th day of the third month, 1831, at Walker Yarnall's, in West-town township. Before she went there, she had been at Philip Price's boarding-school. She went to Walker Yarnall's house to make it her home. He was her father's brother. The witness was there several times during her last sickness. On the 17th day of the third month, on the fifth day of the week, she told the witness she had a good deal of property—some things to dispose of there—which she wished to leave to her uncle Walker Yarnall. The witness stayed all night, and on the 18th day, Priscilla asked her if she thought she could make a will. The witness told her she thought not, but she had better take advice, and perhaps she could give those things. She answered, that she wished to give all she had to her uncle Walker, except some articles which she wished her uncle, Walker Yarnall, to give to her half-brother, Robert Frazer, Betty Black, and Sarah Meredith. A short time before her death, when there were several persons present, she declared that she wished these things divided as she had expressed herself, and that her uncle, Walker Yarnall, and Elizabeth his wife, had heard what she had said and knew all. Walker Yarnall was present on the 17th day, part of the time; he was present when she said she wished him to have all, with the exceptions specified. The last conversation, the witness thought was not more than half an hour before her death, but she was sensible to the very last. She mentioned both on the 17th and 18th, that she wished Walker Yarnall to have it all, but on the 18th no one was present, but the witness. Elizabeth Black, was passing and repassing on the 18th; Elizabeth Yarnall was not present. On the 17th, she told the witness to remember that she wished her uncle Walker to have all her property. When she spoke of leaving her property to Walker, she used the words,

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all her personal property. Elizabeth Black, waited upon her during her last illness. The conversation above stated, which took place about half an hour before she died, was her last conversation. *She said she wished her uncle Walker, to [*49] give to Robert Frazer, Jr., some silver spoons that were marked with his father's first wife's name, and to Elizabeth Black, her bed and bedding, and all things belonging thereto, adding, she did not wish that as a compensation to Betsey Black; she wished her to be paid for her nursing. She said there were some of her school books, which perhaps her half-brother would like to have, but she gave no charge to the witness. She said she wished her aunt, Sarah Meredith, to have a trunk and clothing that belonged to her (Priscilla's) mother. She gave to Sarah Meredith, a bonnet box and two bonnets, and said she wished to divide her clothes among her aunts. She wished her aunt Susanna Hannum to have the crape shawl, and Elizabeth Bartram to have a silk shawl. She stated that her mother had made a will, and had left what came to her, by her (Priscilla's) grandfather, Joseph Pennell, to her half-brother, Robert Frazer; her mother had divided the personal property of her (Priscilla's) father, share and share alike, between her and her brother Robert. Joseph Pennell, was the father of Alice Frazer. She said the farm in Middletown, which came from her father, Eli Yarnall, was left to her mother during her natural life, and she got the rent. She said she did not wish to leave her half-brother Robert, those things which the witness specified; she did not wish to give him her personal property. This was said in the same hour in which she spoke of the manner in which her mother had left her property. The conversation occurred on the 18th. It was on that day she wished the witness to remember how she had left her property. At one time she said "disposed of," and at another "left." The witness thought Priscilla said, that she should remember it both on the 17th and 18th. Priscilla was turned of eighteen years of age when she died.

On being cross-examined by the counsel of the guardian of Robert Frazer, she said, that Priscilla E. Yarnall, died of a pulmonary consumption; the witness did not know how long she had been sick; her uncle Walker brought her from school by her request. She went to her uncle Robert Pennell's soon after her mother's death, remained there a little while, and then went to the boarding-school. There might have been some dissatisfaction formerly between her mother's family, and Walker Yarnall, but they were then in unity. The witness did not know of any particular attachment between Priscilla and her half-brother, and did not know that she sent for him, but he was there on the day of her death. On the morning of the 17th,

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when the witness was sent for, Priscilla was worse than she had been, but when the witness arrived at the house, she was better. On the 17th, the witness thought that she would not live long. She told the witness, that she thought her time would not be long here. On the 17th, she sat up in her bed; she had not for several weeks sat up much out of her bed. On the 18th, she also sat up. During the conversation on the 17th, Walker Yarnall and his wife were in the room; no one else. On the 18th, no one was present but Elizabeth *Black, passing [*50] and repassing. The witness discouraged her from making a will in writing, because she thought she could not, and no writing was made either on the 17th or 18th, nor did she see any one write anything on any day. Walker Yarnall took down what was said, but witness did not see him do so; he read it to her, and asked her if she could witness that; he read it to her after Priscilla's decease, several days before they went to the register's office. The witness then identified the paper read to her, and proved that it was the paper first above mentioned as having been exhibited to the register. She then added, that when Walker Yarnall showed her the paper and asked her if she could testify to its containing the meaning and purport of what Priscilla had said, she answered, that it was the meaning and purport of what she had said; perhaps not the words exactly, but the substance. On the 17th, the witness stated, that if Priscilla had been urged to send for a scrivener, she supposed one would have been sent for, but the witness told her she must consult abler counsel; none was sent for. It was on the 18th that she spoke of drawing a will. If a scrivener had been there, she could have made a will on the 17th. On that day, the 17th, the witness thought she would not tarry, adding, that people in her state of health often go off very suddenly. On the 17th, Priscilla said she wished to dispose of all she had to Walker Yarnall, if she could make a will.

On being re-examined on behalf of Walker Yarnall, the witness stated that the uneasiness between Alice Frazer and Walker Yarnall, took place before Priscilla was born. There was no cause of uneasiness between Priscilla and her uncle Walker. The witness further stated that when she saw the paper, (the first mentioned paper,) before they went to the register's office, she informed Walker Yarnall that there was an error in it; the paper stated the declarations to have been made on the 18th and 19th; whereas, she had stated that they were made on the 17th and 18th.

Susan Price, another witness examined on the part of Walker Yarnall, stated that she was a teacher in a young ladies' boarding-school, at which Priscilla E. Yarnall was placed. From her

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conversations, she believed that she intended to go to her uncle Walker Yarnall's to make it her home. Her time was not fully completed when she left school, but in consequence of delicate health, she went to her uncle Walker's, without intimating any intention of ever returning to school to remain as a pupil. She had been at school nearly six months before she left it.

The witness proved the handwriting of Priscilla, to the following note, the superscription of which, however, was not in her handwriting, but in that of her cousin, Anna Pennell, who was a pupil at the same school:—

WESTCHESTER, 1st mo. 13th, 1831.

“Dear uncle,

Thy non-arrival on third day has induced me to write a few lines, informing you that I shall be prepared to leave [*51] the *school on third day next. I should have written yesterday, had I not been from home, and in the evening I felt rather tired. If business should call thee into Westchester, on another day than 3d, thee need not subject thyself to inconvenience on my account, but thy calling sometime in the beginning of the week, will much oblige thy affectionate niece,
“PRISCILLA E. YARNALL.”

This letter was addressed to “Walker Yarnall, West-town township, Chester county, Pennsylvania,” and was filed in the register's office on the 15th day of June, 1831.

The witness further stated that Walker Yarnall came to the school for her, and she believed paid for the last quarter; whether he paid for Priscilla's tuition or the amount of her extra expenses, she did not know. She stated also, that Priscilla was in delicate health when she came to the school, and her disease seemed to increase upon her very much. It was pulmonary consumption.

Elizabeth Black, who was also examined in support of the alleged nuncupative will, deposed, that she resided at Walker Yarnall's at the time the alleged testamentary declarations of Priscilla E. Yarnall were made, and that she had resided there ever since: That she waited on her day and night, from the time she came to Walker's house until she died: That on the third day night about two weeks before she died, she told the witness that she wished her uncle Walker to have all her personal property that she could dispose of in any way: That the next fourth day night week, being the 16th of the third month, she again said the same thing, and told the witness further, that she wished her to have her bed and all belonging to it: That on sixth day, the 18th, in the evening, after the family had gone to tea, she told

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the witness that she had now settled all her worldly concerns ; “ she wished me to remember she had settled all her worldly concerns ; ” these were her words, “ to her full satisfaction ; ” then, after lying quiet a little while, she said she wished her uncle Walker to have all her personal property, and desired the witness to remember that it was to be so, the way she wished it, that it was her wish that it should be so ; no one was present but the witness at that time : That on first day morning, the 27th, about half an hour before she died, she said to her aunt Betsey, Walker's wife, “ thee'll give him them spoons,” them, was the word ; she then looked at the witness, and said, “ thee knows what thee's to have, three blankets, three coverlids,” and then she recollected they were bedquilts, “ and aunt Sally them clothes and two bonnets and a bonnet box ; ” she then said, “ aunt Betsey knows and Uncle Walker knows all about it, I have told them several times : ” That these words were spoken about half an hour before her death ; they were the last words she spoke, except to ask to be raised up once or so, and were just as she spoke them : That the witness never at any time, heard her speak of leaving anything to her half-brother, Robert Frazer ; the morning before she died, she spoke about some spoons, but did not mention any name : That *the clothes which had belonged to her mother were in a trunk kept in the garret, and on [*52] the 18th she wished those clothes brought to her ; she then laid out a shawl for her aunt Susan Hannum, and another for Betsey Bartram ; one was a silk shawl, the other a crape one, the rest of the clothes she said were all for her aunt Sally Meredith ; she did not then say anything about the bonnet box and bonnet ; she mentioned them on first day morning ; the bonnets and bonnet box were kept in a cupboard, in her room at Joseph Parry's : That the witness was backwards and forwards in the room (in which Priscilla died) on the 18th, when Mary James was there, and heard some conversation take place then ; she told Mary James that she wished her uncle Walker to have her property, and mentioned some things ; she mentioned to Mary James about her clock ; she wished her uncle Walker to have that : That the witness did not recollect anything else at the time when Mary James was there : That so far as the witness knew, Alice Frazer and Walker Yarnall were good friends, visited backward and forwards, and were sociable and friendly : That Priscilla told her, when she came to Walker Yarnall's, that she intended making it her home ; her uncle felt nearer to her than any one else ; more like a father ; she had never known what it was to have a father's house to be at : That the witness recollected John Frazer being there on seventh day, the 19th of the third month ; he was there all night and went away on first day

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morning: That she requested that either Betsey Yarnall or the witness should stay in the room when he was there: That Ann Barton, John Frazer's sister was there: That on fourth day, Priscilla said she talked a great deal to her; worried her; she was worried very much; she was weak, and could not bear it; she wished them (Mrs. Yarnall and herself) to stay in when John was there and talk to him, instead of her answering questions; John was there only once: That on seventh day Priscilla gave John ten dollars, and told him it was for Robert, in place of a watch; she wished her uncle to have the watch, and Robert the money in place of it; the watch had been her father's: That Priscilla told John that she had given her personal property to her uncle Walker; this was said at the time she spoke of the watch, and John said, "Priscilla, thee's too weak to worry thyself about these things; if thee should not get well, there will be a way to settle all these things." Priscilla then said, that Robert wanted the watch, and she was not willing he should have it; she was not willing it should go out of the name.

On her cross-examination, the witness said, That she was not a relation of Walker Yarnall, but had resided with him about fourteen years: That she could not tell exactly how long Priscilla had been sick, but she thought about nine or ten weeks: That she came to Walker Yarnall's the fifth day next after the deep snow, and had never been there before to make it her home; before she went to school she had lived with her mother in Middletown, on the place that had been her (Priscilla's) father's; she lived with her mother *until her death, which [53] occurred early in the spring: That she died of a consumption; she was very weak and thought she would never get well: That some of the goods she gave to Walker Yarnall, were at her uncle's; there were a few chairs there at the time of her death, an old bureau, bed, bedding and bedsteads and a few clothes; the witness could not tell where the rest of the goods were: That the paper first mentioned, as having been offered for probate, was in Walker Yarnall's handwriting, but witness did not know when he wrote it; she saw it first a day or two before they went up to the register's office, and on that day also: That after the death of Priscilla, he never spoke to the witness on the subject of what she had said; he only asked if she would be willing to witness the paper; to which she replied, that she would, for it was pretty much what she had told her: That she had not seen the paper since she was at the register's office, until it was shown to her on her examination, nor had she had any conversation with Walker Yarnall or his family, of any account since she was at the register's office: That on the 18th, when Mary James was with Priscilla, the witness was occupied about

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many things; she was waiting on Priscilla several times, and was out of the room sometimes about the affairs of the house: That Robert Frazer, she supposed was turned of eighteen; Priscilla never sent for him to her knowledge, and she never heard her say a word about sending for him, nor heard one of the family say she had mentioned anything of the kind: That the witness was in the room when she received him on his first arrival; she seemed pleased to see him; spoke to him, but nothing more; Robert Frazer was her half brother and the only brother she had: That he came on the 19th of March, and stayed until after she was buried, which was on the 29th of that month; whether he stayed at Priscilla's request, she did not know; the witness believed she asked John Frazer, in the presence of Priscilla, whether Robert was going to stay, to which he answered, that he was going to leave Robert, and Priscilla said, very well: That Walker Yarnall had no children; she could not tell whether he was a man of considerable property or not; he had a place, and there was always plenty to eat.

Margaret Parry, who was also produced and examined as a witness on behalf of Walker Yarnall, testified that Priscilla had told her a year ago the preceding spring, that she meant to make her home at Walker Yarnall's. She said she felt dissatisfied about her mother's will; all the money which her grandfather Pennell had left her mother, she had willed to little Bobby, (Robert Frazer, Jr.,) and the remainder of her property was to be divided between herself (Priscilla) and him. This witness proved some other matters which need not be repeated.

Isaac Thomas, who attended Priscilla E. Yarnall, as a physician during her last illness, was also examined on behalf of Walker Yarnall, but his evidence is not material.

Henry Myers was then produced and examined on the part of *those who opposed the probate of the alleged nuncupative [*54] will. The only part of his evidence at all material was, that he was the guardian of Robert Frazer, Jr., and having met Walker Yarnall near his own house a day or two after the funeral of Priscilla E. Yarnall, Walker, in answer to a question put by the witness informed him that some part of the effects which had been allotted to Priscilla on a division of the property of Alice Frazer, were then at his house, and that Priscilla had given them to him with a request that he would deliver certain articles to different individuals among her friends. The witness inquired of him whether she had made any disposition of them in writing, to which he answered, that she had not. Walker Yarnall at that time intimated no intention of setting up a nuncupative will, and when he mentioned what she had given to him, he said nothing about moneys or all her personal

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property. A few days after, he served a citation on the witness, as the guardian of Robert Frazer, to appear at the register's office of Chester county. The witness said he knew there were moneys in the hands of the executor of Alice Frazer, belonging to Priscilla E. Yarnall, and that some of it had been taken out of his hands, as the witness thought, improperly. The amount which he supposed would be the portion of Priscilla was between seven and eight hundred dollars.

John F. Frazer, a half-brother of Robert, was likewise examined in opposition to the alleged will. The tendency of his evidence was principally to show the affection Priscilla entertained for Robert, and that at her request, he had been brought from school, at Pittsfield, Massachusetts, to see her during her last illness.

Ann Barton, a half-sister of Robert Frazer, Jr., who was examined on the same side, likewise gave evidence tending to show the attachment of the deceased to her brother Robert, and further stated, among other things, that she was at Walker Yarnall's on the Wednesday preceding the 19th of March, on a visit to Priscilla. On that day, after inquiring about the progress of Robert at school, whether his income was sufficient to defray the expenses of his education, &c., she said she believed her property went to Mr. Yarnall and her two cousins, Thomazine Pennell and Priscilla Wells. The witness replied that it certainly did, but said, if you have anything to give, give it to him, for his situation is so different from that of both the other branches of the family that he may feel it. Priscilla evinced great feeling on the occasion, and asked if she could make a will. The witness told her she did not know, but thought she could, and advised her to ask Mr. Myers who would be up the next day. She then expressed a wish to see him, hoped he would come and said she wished to leave Robert all she could give him, adding she wished she could give him more, he was nearer to her than any one else, but her father's property was willed away. She also expressed a wish to see Dr. Barton, as well as Mr. Myers, not professionally, as the witness thought, but about her affairs.

In conclusion, the counsel of Walker Yarnall, examined as a witness *to support the alleged will, Joseph Parry, who [*55] testified that he lived on a farm belonging to Priscilla E. Yarnall, and that she had told him to mind what her uncle Yarnall said to him respecting the place, and not anybody else—if any one else was displeased, not to mind that; if he only pleased him, he would please her, for she wished him to do all her business, although she had a guardian. She then told the witness she thought she had not been well treated by her mother in her

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will; all the money she had got by her (Priscilla's) grandfather, she had given to little Bobby, and full half the money she had given to him, she had made on her (Priscilla's) place; adding, that she thought the Frazer family had got pretty well of her place and her already, and she thought they were about done ever getting any more.

The cause was argued in this court by *Dillingham* and *Chauncey* for the appellant, and by *Bell*, for the appellee.

Arguments for the appellant:—The contending parties are, on the one hand, an uncle of the testatrix, on the paternal side, from which the property came, and on the other, a maternal half-brother, who besides his share of his father's estate, has already received a considerable portion of the estate which came from her father. The whole tenor of the evidence, shows a decided aversion on her part to the claims of her brother's family, and her attachment to her maternal uncle, as well as her sense of the justice of his succeeding to the property which she derived from her father. After leaving school, she went to his house as her home. She left school about the middle of January, 1831, and about three weeks afterwards, was placed under the care of a physician, who pronounced her case desperate. After having been confined to her bed and given up all hopes of recovery, she made the nuncupative will offered for probate. That Walker Yarnall's house was her home, and that it was her intention to dispose of her property in his favour, are facts which the evidence places beyond a doubt. On the 15th of March, according to the testimony of Elizabeth Black, she expressed a wish to give to him all her personal property. On the 16th, she was visited by Mrs. Barton, the half-sister of Robert Fraser, Jr., who urged her to make a will in his favour. On the 17th, she inquired of Mary James whether she could make a will, and repeated her desire to leave all her personal property to Walker Yarnall; Mary James dissuaded her from making a will, but suggested a substitute. On the 18th, she said she wished to give all she had to her uncle Walker, with certain exceptions, and requested Mary James to remember it. Elizabeth Black was passing and repassing during the conversation, and heard her say this to Mary James, and afterwards she too, was requested by Priscilla to remember it.

The question then is, were these words thus proved by two witnesses, spoken by the deceased as testamentary? To determine this question, it will be necessary to inquire into the meaning of the *terms will and testament. In several cases [56] they are indiscriminately used, and signify "the testifying or declaring of the mind." The *animus disponendi*, is the only

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essential particular. Swinb. on Wills, 2, 3, 12, 13. See also, 7 Ba. Ab. (Wils. Ed.) 299, 300; Wills and Testaments, A.; 2 Bl. Com. 499. A nuncupative will is synonymous with a verbal will, Swinb. 51. What is chiefly required to constitute such a will is, that the testator should name his executor, and declare his mind by word of mouth, without writing before witnesses; no precise form of words is required, Swinb. 336. Here the deceased did declare her mind plainly by word of mouth, before witnesses, as to the disposal of her property after her death.

The objections made in the court below to the validity of the alleged will, were—1. That the witnesses were not at the same time requested to take notice that what she declared was her will,—2. That her declarations were not made in *articulo mortis*. The act of assembly of 1705, sec. 3, Purd. Dig. 876, which is modelled after the Stat. 29 Ch. 2, c. 3, s. 19, requires that a nuncupative will shall be proved by two witnesses, who were present at the making thereof, and that it shall be proved that the testator at the time of pronouncing the same, did bid the persons present, or some of them, to bear witness that such was his will, or to that effect. It further requires that such nuncupative will, be made in the time of the last sickness of the deceased. The *rogatio testium*, was in this case complete. Two witnesses, Mary James and Elizabeth Black were present on the 18th, when the *testatio mentis* was made; both prove the testamentary words spoken at the same time, and Mary James testifies that she at the same time, bade her remember how she had left or disposed of her property, which is to the same effect, as requesting her to bear witness that such was her will. Thus the terms of the act were literally complied with. But it does not require that both the witnesses should be requested to bear witness at the same time, nor that their attestation should be simultaneous. No case has decided that this is necessary, and it is not analogous to what is required in the case of written wills. Ever since that statute of wills, it has been decided both in England and this country, that the attestation of the witnesses need not be simultaneous. 1 Roberts on Wills, 131; Cook v. Parsons, Prec. in Ch. 185; Jones v. Lake, 2 Atk. 176. This directly contradicts the provisions of the civil law which requires the publication or solemnization of the will to be *uno actus contextu*, that it should be signed, published, and attested, *simul et semel*, 1 Roberts on Wills, 131, note 2; Ib. 136, note 6. See also Swinb. part 4, sec. 26, 27. The policy of the civil law in respect to wills, was in all respects more strict than that of the common and statute law of England, and in Pennsylvania, it is still less strict than in England. Form and solemnity as to wills are now dispensed with, and if the *animus testandi*, be fully proved,

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it is enough. A mere indorsement on a note, "I give this note to A.," may be proved as a will. 7 Ba. Ab. 301, Wills, A. In Pennsylvania, it is not necessary that a will *should be signed, sealed, witnessed, or published, or that it should [*57] be in the handwriting of the testator. *Hight v. Wilson*, 1 Dall. 94; *Rossetter v. Simmons*, 6 Serg. & Rawle, 452.

Assuming that the *testatio mentis* has been proved by the requisite number of witnesses, the next step towards the establishment of the alleged nuncupative will in question, is to show that it was made "in the time of the last sickness of the deceased." Is it meant that the person making testamentary declarations, must be *in extremis*? The construction put upon the words of the act by the court below is artificial and constrained, and was adopted in submission to the opinion of Chancellor Kent, in the case of *Prince v. Hazelton*, 20 Johns. R. 502, in which he was misled by his feelings and prejudices, and misled with him a majority of the Court of Errors of New York. The facts of the present case in relation to this point are, that the deceased, on the 18th of March, made her will, and died on the 27th of the same month. Her case had been previously pronounced by her physician hopeless. Her friends were aware of her situation, and she was fully aware of it herself. To no one did she express an expectation that she should recover after the 15th of March. Her will was thus made emphatically in the time of her last sickness, and made "for fear that death or want of memory or speech should surprise her, that she should be prevented if she stayed the writing of her testament; wherefore, she desired her friends and neighbours to bear witness of her will, and declared the same presently before them." 7 Ba. Ab. 305, Wills and Testaments, D. The words of the act, "in the time of the last sickness," are so remarkable as to contradict, by any fair reasoning, the construction put upon them. There are three things to be observed in regard to the case of *Prince v. Hazelton* which tend greatly to weaken its authority. 1. It is a leading case unsupported by a single precedent since the statute of Charles II. 2. It utterly fails in the attempt to find a technical meaning for the words of the act in the definitions and descriptions of nuncupative wills by elementary writers. 3. It proceeds in part upon the erroneous assumption of a similar principle in the case of a *donatio causa mortis*, and abounds in false reasoning. It is to be observed likewise that Judge Spencer assigns special reasons for his opinion, which are not applicable to the present case, and Judge Woodward dissents *totis viribus*. That case can only be considered as a precedent for such as are exactly analogous to it. Before giving his opinion on the law, the Chancellor had come to the conclusion "that the will was

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evidently the production of fraud and perjury," in which Judge Platt agreed with him. "It was made in the middle of the day, when the alleged testator was quite comfortable and far from the apprehension of death." Even the correctness of the Chancellor's definition of a *donatio causa mortis*, may be questioned. That it can only be tolerated when the party making it is *in extremis*, has been held by many not to be good law. 1 Roberts on Wills, 10, note. Spencer's opinion is expressly founded upon this [*58] reason, "that it appeared from all the *evidence in the case, that when the alleged will was made, he did not think himself, nor did any other person think him to be in any immediate danger of dying, and there was ample opportunity to make a will in writing." In the case of Priscilla E. Yarnall, the reverse of this was the truth. Besides, her will was actually published again on the 27th of March, only half an hour before she died. Mary James and Elizabeth Black, both say that she called the attention of all present to the manner in which she had disposed of her property. The very words, "I bid you to bear witness that such is my will," may not have been used, but the manner in which she repeated her intentions to all present, in connection with her last words, must be considered as equivalent to an express request to take notice of her will. She positively and distinctly referred to her will at this time, in the presence of two persons who had previously heard her declare it, and thus with her last words requested them to take notice of it.

The counsel for the appellant, besides the authorities already referred to, cited Perkins, sec. 467; Swinb. part 1, sec. 12; 6 Wood, 474; Orph. Leg. sec. 12, 13.

Arguments for the appellee.—The alleged will is bad,—

1. Because it is not proved by the requisite number of witnesses.

2. Because it was not made during the last sickness of the deceased.

3. Because the witnesses do not agree as to what the will is.

4. Because the *animus testandi* does not sufficiently appear.

1. Nuncupative wills were known to the common law prior to the statute 32 Hen. 8. During the unlettered ages they were of frequent occurrence, and it would seem, from subsequent enactments, gave rise to numerous frauds and perjuries. It was to correct this evil as far as possible, that the Statute of Frauds and Perjuries was enacted. St. 29, Ch. 2, 6, 3; 7 Ba. Ab. 337; 2 Bla. Com. 500. From this statute our act of assembly of 1705, was copied, almost literally, except that it is satisfied with two witnesses, while the English statute requires three, (See 2 Phillimore, 191, 194.) In both these acts, the fol-

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lowing provision is to be found, viz.: "that no nuncupative will shall be good," &c., "that is not proved by two or more witnesses, who were present at the making thereof, nor unless it be proved that the testator at the time of pronouncing the same, did bid the persons present, or some of them, bear witness, that such was his will," &c. Two witnesses at least, must be present at the time the alleged will was made, and in this respect only our act differs from the English statute which requires three. The words of the act are so clear as not to require the aid of authority to give them a construction, nevertheless as this position was combatted in the court below, it may be proper to cite some authorities in support of it. It is not enough if one witness hear the will at one time, and another at another time. The witnesses must all be present together at the time the testamentary declarations are made. *Dr. Chalmer's Case*, 7 Ba. Ab. 339; 1 *Eq. Ca. Ab. 403, 404. The position that the witnesses need not be present at the same time, derives no sup- [*59] port from a supposed analogy between nuncupative and written wills. They are essentially different. In the case of a will of lands, the statute does not require the testator to sign the instrument in the presence of the witnesses. 7 Ba. Ab. 306, 308; 1 Eq. Ca. Ab. A. 403. But our act of assembly expressly requires, that a nuncupative will shall be declared in the presence of the witnesses, and that the testator should bid the persons present, or some of them, take notice. On no occasion were testamentary declarations made by Priscilla E. Yarnall, in the presence of two witnesses at one time. They were not made in the conversation proved by Elizabeth Black two weeks before her death, when she said she wished her uncle Yarnall to have all the personal property she could dispose of. They were made in the presence of only one witness, and it is not pretended that they constitute the will. Nor were such declarations made on the night of the 16th of March, when, according to Elizabeth Black, she repeated what she had said before, and added that she wished the witness to have her bed, &c. This conversation is liable to the same objection as the preceding one; nor could the alleged will have been made on the 17th, when she told Mary James that she had property there which she wished Walker Yarnall to have. Only one witness was present on that occasion. That these conversations were not intended as testamentary dispositions is evident from her asking Mary James, on the 18th, if she thought she could make a will. Aware of the difficulty he has to encounter, the appellant, in one of the papers filed, has taken the 18th and 19th, and in the other the 17th and 18th, as the days on which the will was made, and by tacking together the loose conversations, no two of which agree,

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he attempts to make out a testamentary disposition. If such a disposition was not made on the 18th of March, 1831, it was not made at all. On that day there were two conversations; one during the day with Mary James; the other at night with Elizabeth Black, and although Elizabeth Black says she heard some part of the conversation addressed to Mary James, yet she heard it only in detached parts as she was passing backwards and forwards at the time and engaged in various matters about the house. At the conversation on the evening of the 18th, with Elizabeth Black, no one was present but Priscilla and herself; up to this time, then, no two witnesses were present at any one conversation. But it is said that on the 27th of March, there were two witnesses present at what is called a republication of the will. A republication only takes place where the will has been revoked by act of law or of the party, 7 Ba. Ab. 320. There can be no republication of a nuncupative will except by a repetition of all the words and formalities necessary to make the will itself. To say that in the present instance, a republication took place, is to make a will by reference to that which never had any existence as a will. And what was said on the 27th, cannot be set up as a will, standing by itself, because testamentary words are wanting. 1 Eq. Ca. Ab. 403; Ba. Ab. [*60] 338, 339. Instead of appealing to the witnesses, and calling on them to take notice of her will, she refers to the legatee and his wife as knowing the dispositions she had made of her property, which proves that Mary James and Elizabeth Black were not considered by her as witnesses to her will. How could they know what she had said to Walker Yarnall and his wife? Another fatal objection to the alleged will is, that the witnesses do not agree even in substance, as to the alleged testamentary declarations, and there is a material difference between the dispositions said to have been made on the 17th, and those said to have been made on the 18th. (The counsel here referred to the evidence in support of his allegation. The reason why the law requires the presence of more than one witness is to guard, as far as possible, against the frailty of human memory, and this case affords a singular illustration of the wisdom of its provisions.

2. The alleged will was not made in the last sickness of the deceased. A nuncupative will, prior to statute 29th Ch. 2, is described to be a will by word of mouth, made lest death should overtake the testator, if he should wait until it is reduced to writing. 7 Ba. Ab. 305; Swinb. part 1, sec. 12, page 58; part 7, sec. 12, page 520. To be effectual, it must be made *in extremis*. The only instance in which favour is shown to such a disposition of property, is when the testator is surprised by

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sudden and violent sickness, 2 Bl. Com. 500, 501. It may be doubted whether nuncupation is allowable in any case of lingering disease, where, while the party is warned of approaching dissolution, time is given for preparation. This construction has been given to the New York statute on this subject, which is similar to ours. In the case of *Prince v. Hazelton*, 20 Johns. 502, in which all the authorities are collected, and the subject fully considered, the alleged testator had been sick six weeks. The alleged will was made on the 11th of April, 1820, and the testator died on the 17th of the same month, six days after, and the will was not admitted to probate. The disease of Priscilla E. Yarnall, was of a lingering character, a pulmonary consumption. She had been confined nine or ten weeks, during the greater part of which, she was perfectly capable of making a will. Until a very late period of her life, she did not despair of recovery. The alleged will was made on the 18th, and she did not die until the 27th of March. On the 18th she was certainly not *in extremis*, and if she really wished to make a testamentary disposition of her property, there was nothing to prevent her doing it in writing.

3. The proof differs as to what the alleged will really was, supposing the other difficulties to be out of the way. (The evidence was here examined and commented on by the counsel, and the alleged inconsistencies in it pointed out.)

4. The *animus testandi* does not sufficiently appear. The intention to bequeath, must be distinctly shown. Loose words are not sufficient. 2 Bl. Com. 501; Swinb. part 7, section 13, page 520, 521. *On the 16th of March, she consulted Mrs. Barton, about her power to make a will. On the 18th, [*61] she consulted Mary James, who thought she could not make one. She wished to see Dr. Barton and Mr. Myers on the subject of her affairs, and on the 18th, she expressed a wish to give, &c. With these doubts on her mind, it is impossible she could have supposed she was making a complete testament, when the conversations took place, which have been given in evidence. If she knew what a nuncupative will was, and thought she had made one, and had called on witnesses to attest it, she would not on the 27th have referred to Walker Yarnall and his wife as the depositories of her views in relation to her property. If she intended to dispose of anything, she intended to make a *donatio causa mortis* of the articles in the house, and this was incomplete for want of delivery. It is impossible she could have intended to give her whole estate to her uncle. He was wealthy and without children, and did not stand in need of it; while her brother Robert, though a member of an opulent family, was poor. She was attached to him, said he was nearer to her than

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any one else, had him sent for from school in Pittsfield, Massachusetts, manifested a warm interest in his welfare, and a desire to leave him all that she had in her power, and regretted that her father's property was placed beyond her control. Can it then be believed that she intended to deprive him of all she had it in her power to dispose of? None of the witnesses speak of her having given to Walker Yarnall her money. It is mentioned nowhere but in the paper drawn up by himself? To Mary James she said, she had some things to dispose of there, that is at Walker Yarnall's, which she wished him to have. She may have intended to make a disposition of those articles in his favour, but if she did, it could not take effect either as a nuncupative will, or as a *donatio causa mortis*, for the reasons already given. As to anything else, no *animus testandi* appears.

The opinion of the court was delivered by

ROGERS, J.—The papers purporting to be the nuncupative will of Priscilla E. Yarnall, are opposed on four grounds :

1. They are not proved by the requisite number of witnesses.
2. There is an absence of the *animus testandi*.
3. Because the witnesses do not agree as to what the will is.
- And 4. That the will was not made in the time of the last sickness of the deceased.

The act of 1705, (which is in no respect different from the statute 29 Charles, except in the number of witnesses which is required) enacts that no nuncupative will shall be good, where the estate thereby bequeathed, shall exceed the value of thirty pounds, that is not proved by two or more witnesses who were present at the making thereof, nor unless it be proved that the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness, that such was his will, or to that effect ; nor unless such nuncupative will be made [*62] in the time of the last sickness of *the deceased, and in the house of his or her habitation or dwelling, or where he or she hath been resident for the space of ten days or more, next before the making of such will, except when such person was surprised or taken sick, being from his own house, and died before he returned to the place of his or her dwelling.

Nuncupative wills, though tolerated, are by no means favourites of the law.

Sir William Blackstone observes, that the legislature has provided against frauds in setting up nuncupative wills, by so numerous a train of requisites, that the thing itself has fallen into disuse ; and it is hardly ever heard of, but in the only instance where favour ought to be shown to it, when the testator is surprised by sudden and violent sickness. The testamentary words

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must be spoken with intent to bequeath ; and as the same learned writer observes, not in any loose idle discourse ; for he must require the by-standers to bear witness of such his intention. The will must be made at home or among his family or friends, unless by unavoidable accident, to prevent imposition by strangers. It must be in his last sickness ; for if he recovers he may alter his dispositions, and has time to make a written will. It must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses ; nor yet too hastily and without notice, lest the family of the testator should be put to inconvenience or surprise. Much more is requisite to the due proof of a nuncupative will than a written one. Numerous restrictions, (as we have just seen,) are imposed upon such wills, the provisions of which must be strictly complied with, to entitle a nuncupative will to probate. The absence of due proof of strict compliance with any one of these is fatal. *Bennett v. Jackson*, 2 Phill. 190 ; *Parsons v. Miller*, 2 Phill. 194. So also, the *factum* of a nuncupative will requires to be proved by evidence more strict than that of a written one, in every single particular. This is requisite in consideration of the facilities, with which frauds in setting up nuncupative wills are obviously attended ; facilities which absolutely require to be counteracted by courts insisting on the strictest proof as to the fact of such alleged will. Hence the testamentary capacity of the deceased, and the *animus testandi*, at the time of the alleged nuncupation, must appear in the case of a nuncupative will, by the clearest and most indisputable testimony. Above all, it must plainly result from the evidence, that the instrument propounded contains the true substance and import, at least, of the alleged nuncupation ; and consequently that it embodies the deceased's real testamentary intentions, though not so reduced to writing during his or her life, as to be capable of being propounded as a written will ; for unless the court is morally certain, by pronouncing for it, of carrying them, and no other intc effect, it is obviously its duty, not to give any alleged will, much less a nuncupative one, the sanction of its probate.

The words of the act are, that no nuncupative will shall be good, *where the estate bequeathed, shall exceed the [*63] value of thirty pounds, that is not proved by two or more witnesses who were present at the making thereof, nor unless it be proved, that the testator at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect.

It must be observed, that there is a marked difference, as regards the attestation, between a written and a nuncupative will, the legislature having placed many guards on the latter, which

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were unnecessary on the former. A written will may be reduced to writing at one time, and attested by the witnesses at different times. Not so as we conceive in the case of a nuncupative will, which more nearly resembles the formula observed in the civil law. In the Roman jurisprudence it was held, that a testament ought to be made *uno contextu*, without any foreign act intervening, and the witnesses were likewise required to attest without separating, or even discontinuing the act of subscribing, till all was complete. The legislature, in the act of 1705, evidently looked to the nuncupative, as an evil, and it will not do for the testator to declare his will first in the presence of one witness, and afterwards in the presence of another witness. As in the Roman law, it does not seem that the witnesses were even released from the necessity of subscribing at one time, and in each other's presence, so we think that the requisite number of witnesses must be present, and called on to attest at the same time, of the alleged nuncupation. The act says, the will must be proved by two or more witnesses who were present at the making thereof. We are further of the opinion, that the *rogatio testium*, the calling on persons to bear witness to the act, must also be done at the time of the nuncupation, and that this must be proved by two or more witnesses, who were present at the time. I cannot conceive why inferior proof should suffice. It is an important part of the nuncupation, and goes far to show the *animus testandi* of the deceased, and for this purpose it was that the act requires that the testator should call on the witnesses to remember that such was his will. The act says, the will shall not be good unless the testator, at the time of pronouncing the same, did bid the persons present, or some of them, bear witness that such was his will, or to that effect.

The legislature go upon the supposition, that more than two may be present, who may be called on to bear witness to the publication of his will, or that the testator may bid some of them, (not some one of them,) to bear witness that such is his will. We think this construction necessary, as a guard against fraud, to which nuncupations are particularly exposed. I cheerfully admit, that the act does not require any particular words for a *rogatio testium*. It is certainly sufficient if the court is satisfied, that the deceased meant to do a testamentary act, and wished the persons to attest, but I cannot agree, that if he desired only one to attest it, that satisfies the requisition of the statute. Still less can I suppose, that the *rogatio testium* to different witnesses at different times, would fulfil its requirements.

[*64] *Test this case, by these principles, and the court is clearly bound to say, that this will has not been

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proved according to the act, and should not be admitted to probate.

Without insisting on the point, that there were not two witnesses to the whole will present on the 18th, the time of the alleged nuncupation, it is perfectly certain there is an absence of the requisite proof of the *rogatio testium*, at that time. Mary James says, that Priscilla E. Yarnall mentioned, both on the 17th and 18th, that she wished Walker Yarnall to have all her property, but that on the 18th no one was present but herself. Elizabeth Black was passing and repassing on the 18th. She says that the testatrix told her to remember that she wished her uncle Walker to have all her property. This was on the 18th. She says she is satisfied she told her to remember it; and this both on the 17th and 18th, she thinks. On the 17th and 18th there is no other person who proves the *rogatio testium*, for although Elizabeth Black was passing and repassing on the 18th, she does not pretend to say that the testatrix called on her at that time, to bear witness that such was her will. Elizabeth Black testifies, that on sixth day, in the evening, after the family went to tea, she told her she had now settled all her worldly concerns, to her full satisfaction, and this she wished her to remember; that she wished her uncle Walker to have all her personal property. But she adds, no one was present but her at that time. She in no place proves that at the time of which Mary James speaks she was bid to remember the dispositions the testatrix made of her property.

Independently also of the want of the *rogatio testium*, there is great doubt whether there was that *animus testandi*, which the statute requires. I do not know that any form of words is required, but it is clear that the testamentary capacity of the deceased, and the *animus testandi*, at the time of the alleged nuncupation, must appear in the case of a nuncupative will, by the clearest and most indisputable testimony. *Bennett v. Jackson*, 2 Phillimore, 193; *Leman v. Bonsal*, Adams's R. 389.

It is by no means certain that the alleged testatrix was aware that she had the power to make a will. She asked Mary James on the 18th, whether she thought she could make a will, who told her she thought not, but she had better take advice, and told her that perhaps she could give those things. She told witness that she had a good deal of property, some things to dispose of there, which she wished to leave to her uncle Walker Yarnall. This was on the day of the alleged nuncupation. Afterwards, (I infer it to be so,) she asked Ann Barton if she could make a will. She told her she did not know, but thought she could, that she should ask Mr. Myers, who would be up the next day. She

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then expressed a wish to see him, hoped he would come, and said she wished to leave her brother Robert all she had. Whether she ever consulted Mr. Myers does not appear, but from this it is evident that at that time she had no idea she had made a disposition of her property by will. Nor is it very clear that she [*65] ever *intended her uncle Walker to have any property except such as was then at his house. The expressions to Mary James are very peculiar. She said she had a good deal of property, some things to dispose of there, which she wished to leave to her uncle Walker Yarnall. It is very doubtful, whether it ever entered her mind to dispose of the moneys which belonged to her, and which her uncle has been so careful to insert in his statement of the will. It is passing strange, if the testatrix had an idea that she could make a will, that the will was not reduced to writing.

These views would be sufficient to prevent the will being admitted to probate: but there is one other point, on which we think it right to express an opinion. Was this nuncupation in the time of the last sickness of the deceased, and coupled with this, does it possess the other requisites to entitle it to probate? The prominent facts, as connected with this part of the case are these. Priscilla E. Yarnall was a minor, of the age of eighteen years, who had been afflicted with a pulmonary consumption for about six months, of which she died on the 27th of March, 1831; The will was made on the 18th, nine days before her death. Although weak in body, she retained the possession of all her faculties until the last hour of her life. Can a will, made under such circumstances, be entitled to probate, as a nuncupative will?

This point has been deliberately examined in the Court of Errors in New York (where they have a similar statute,) in the case of Prince, Public admr. in the City of New York, Appellant v. Hazelton and Wife, 20 Johns. R. 503. Chancellor Kent, who has examined the case with great care, and whose views we adopt, has come to the conclusion, that a nuncupative will is not good, unless it be made by the testator, when he is *in extremis*, or overtaken by sudden and violent sickness, and has not time or opportunity to make a written will. I have examined the authorities on which the Chancellor relies, and although the opinion of some of the elementary writers are stated rather more strongly than there is any warrant for, yet, on the whole, the Chancellor undoubtedly is sustained by authority, in the general view he has taken on the reason of the rule, as applied to the construction of the statute. The Chief Justice of Connecticut also says, "Nuncupative wills are allowed only when *in extremis* and dangerous sickness, the testator has

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neither time nor opportunity to make a written will, and sincerely and deliberately declares his intention respecting the disposition of his estate before a number of witnesses called for that purpose." 1 Swift's System, 420. Unless we give the statute this construction, we must give effect to every disposition made at any time, however protracted the disease may be, and whatsoever opportunity there may have been to make a written will. The inconvenience of such a construction is strongly shown in the opinion of the Chancellor, to which I have referred. Priscilla E. Yarnall can, with no propriety be said to have been *in extremis* at the time of the alleged nuncupation. There was nothing to prevent *her making a written [*66] will. Although fully impressed with the nature of her disease, she does not appear to have lost all hope of life. On the contrary, she speaks of her recovery, and her subsequent plans. She lived nine days after speaking the pretended testamentary words, with the full possession of all her faculties up to the moment of her death.

It is unnecessary to examine the testimony in respect to the other point made by the appellees. It is conceded that the witnesses must agree as to the testamentary disposition. Unless the court is morally certain of carrying the will of the deceased, and no other, into effect, it is obviously its duty not to give the will the sanction of its probate.

In conclusion, I have to remark, that there was an obvious impropriety in the principal devisee reducing the nuncupative will to writing. And this is shown in the case itself, by his inserting a word, which he supposed made for him, not used by the testatrix, at least not proved by the testimony of any of the witnesses.

Decree of the Circuit Court affirmed.

Cited by Counsel, 3 W. 337; 2 Wh. 21; 10 Barr, 257; 6 H. 327; 1 Wr. 216; 1 S. 348; 6 S. 170.

Cited by the Court, 4 W. & S. 360; 6 W. & S. 188; 9 H. 300; 11 Wr. 36.

Nuncupative wills are not favored. They are, however, allowed by the Wills' Act (April 8, 1833, s. 7), which provides that personal estate may be so bequeathed under the following restrictions: The bequest (or will) must be made in the *extremity* of the last sickness of the testator, at his home, or where he has resided at least ten days, unless he be overtaken by his last sickness while away from home, and die before returning: if the bequest exceeds one hundred dollars, the testator must request some of those present to attest his act: and all these facts must be proved by two witnesses. There is an exception in the case of mariners at sea and soldiers in actual service (not on furloughs, 6 Phila., 104), as to summoning those present to attest the act.

[PHILADELPHIA, FEBRUARY 4, 1833.]

Evans and Wife against Knorr, Executor of Norton.

Testator devises to G. K., his executor, and to his heirs and assigns, a certain tract of land, which he purchased of W. S. E., with the appurtenances; also, all the goods and chattels assigned to him by the said W. S. E., to hold to him the said G. K. his heirs and assigns in trust, only to and for the sole and separate use of A. E., the wife of the said W. S. E., and the heirs and assigns of her the said A. forever, so that the same shall not be in any manner or way whatever, subject to any of the debts, contracts, or engagements of her husband. "I also give and bequeath unto the said G. K. the sum of one thousand dollars in trust, for the use of her the said A. E."

Held, that the bequest of one thousand dollars, was not for the sole and separate use of the wife, but went to the husband.

CASE stated for the opinion of the court.

Thomas Norton, the defendant's testator, by his last will and testament, dated the 9th day of the 1st month, 1821, and duly proved, among other things, devised as follows:—"I give and devise unto my friend George Knorr, my executor, hereinafter named, and to his heirs and assigns, my tract of land, situate on the Susquehanna, containing four hundred acres or thereabouts, which I purchased of William Savery Evans, with the appurtenances; also, all the goods and chattels assigned to me by the said William Savery Evans, to hold to him the said George [*67] Knorr, his heirs and assigns, in trust only *to and for the sole and separate use of Ann Evans, the wife of the said William Savery Evans, and the heirs and assigns of her the said Ann forever; so that the same shall not be in any manner subject to any of the debts, contracts, or engagements of her husband. I also give and bequeath unto the said George Knorr, the sum of one thousand dollars in trust for the use of her the said Ann Evans."

The case to be considered as if a refunding bond had been filed before the institution of the suit; and it is agreed that such bond shall be filed or given before the legacy is received.

The question submitted to the court is, whether the plaintiffs are entitled to recover the legacy of one thousand dollars, mentioned in the case?

If the court shall be of opinion, that they are so entitled, judgment to be entered for the plaintiffs, for the amount of the legacy and arrears of interest unpaid. If the court shall be of opinion, that they are not entitled to recover, judgment to be entered for the defendant.

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Chauncey for the plaintiffs.

Potts for the defendant.

The opinion of the court was delivered by

KENNEDY, J.—This is a case stated for the opinion of this court, from which it appears, that Thomas Norton, by his will dated the 9th of January, 1821, *inter alia*, devised as follows: "I give and devise unto my friend George Knorr, my executor hereinafter named, and to his heirs and assigns, my tract of land situate on the Susquehanna, containing four hundred acres or thereabouts, which I purchased of William Savery Evans, with the appurtenances; also, all the goods and chattels assigned to me by the said William Savery Evans, to hold to him the said George Knorr, his heirs and assigns in trust only to and for the sole and separate use of Ann Evans, the wife of the said William Savery Evans, and the heirs and assigns of her, the said Ann forever, so that the same shall not be in any manner or way whatever subject to any of the debts, contracts, or engagements of her husband.

"I also give and bequeath unto the said George Knorr, the sum of one thousand dollars in trust for the use of her the said Ann Evans."

The question to be decided is, whether the one thousand dollars are given in trust for the sole and separate use of Ann Evans, or not?

In *Torbert v. Twining*, 1 Yeates, 432, the rule that was previously established, and which still prevails in England, was recognised and adopted here by this court. The rule is, that the intervention of trustees, to whom a devise or bequest is made for the use of a married woman, is not, of itself, sufficient to determine it to be for her separate use. See *Dakins and wife v. Berisford*, 1 Cha. Ca. 194, and *Lumb v. Milnes*, 5 Ves. 517.

*In the case of *Torbert and Twining*, the testator [*68] by his will, dated the 25th of October, 1791, first gave to his daughter, (the wife of Samuel Torbert,) the use, issues, and profits of his land and tenements, not already bequeathed. Afterwards, on the 12th of November following, by a codicil to his will, after reciting this devise and bequest, he proceeded as follows: "but on further consideration of it, I give all the lands, (meaning the same lands,) and tenements and appurtenances thereunto belonging to my brother, Jacob Twining, and friend, Thomas Story, in trust for the use, benefit, and behoof of my daughter for and during her natural life, they (the trustees,) or the survivor of them, to rent out in the best manner they can, so that no waste is made of the timber, and the best care that can be to preserve the land from abuse by

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extravagant tillage, she my said daughter to have all the rents, issues, and profits arising from the aforesaid plantation during her natural life."

This court held that Samuel Torbert, the husband of the testator's daughter, was entitled to the benefit of this devise, and that it was not to be construed a devise to the trustees for her separate use. This decision has never been overruled, and must be regarded as having become a rule of property in the state. It is not impugned in the slightest degree by the decision in *Jamison v. Brady*, 6 Serg. & Rawle, 466. On the contrary, the court expressly disavows questioning its validity; and ruled in that case, that a bequest to a *feme covert* "for her own use," was equivalent to a bequest given to her for "her sole and separate use." The emphatic word, "own," was made the foundation of that decision, which is not in the present case.

But it has been contended that the clause giving the legacy of one thousand dollars, is connected with the preceding clause, by the word, "also," and as in the preceding clause, the bequest of the goods, &c., is given expressly for the sole and separate use of Ann Evans, that the word "also," was used by testator, to show that he gave the thousand dollars to be held in like manner, and that the clause ought to be read thus, "I give and bequeath under the said George Knorr, the sum of one thousand dollars, in trust, in like manner, for the use of her, the said Ann Evans."

As authority for this construction has been cited, *Sheps. Touch.* 140, 141, where it is said, "If one devise his land thus, I give Whiteacre, to my eldest son and his heirs for his part; Item, Blackacre to my youngest son for his part; by this devise the youngest son shall have the fee simple of Blackacre. So if I give Whiteacre to *I. S.* Item, Blackacre to *I. S.* and his heirs; by this devise *I. S.* shall have the fee simple of Whiteacre also. Or if one devise Whiteacre to *I. S.* and then say, Item, Blackacre to *I. S.* and the heirs of his body; by this devise he hath an estate tail in both Acres. For these several cases, there is no other reference than one in the margin to *Trin.* 30, *Eliz.* The rule of construction which was adopted in those cases, is not given; nor have I met with any report of the same date, in which they are contained and explained.

[*69] *But by turning to some of the cases on this subject, all that has been set forth and quoted from *Shep. Touch* will be found in other cases, and the rule for the construction put on these sentences, so fully explained as to show that neither they nor yet any of the adjudications in respect to this matter, sustain the construction contended for by the counsel for the plaintiffs.

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In the case now under consideration, the clause giving the one thousand dollars legacy, is an entirely distinct one from the preceding; and there certainly needs no reference or relation to it, in order to give it either meaning or effect, because it is complete and perfectly intelligible in itself. The word, "also," which is prefixed to the sentence, serves, as it most frequently does in wills, to point out the beginning of a new devise or a new bequest. It imports no more than, "Item," and is of the same signification in this place as "moreover," and cannot be construed to mean "in like manner," as if the testator had said, "I give and devise unto my friend, George Knorr, and to his heirs and assigns, my tract of land, situate, &c., with the appurtenances; also, all the goods and chattels assigned to me by the said William Savery Evans, to hold to him the said George Knorr, his heirs and assigns in trust, only to and for the sole and separate use of Ann Evans, (wife of the said William Savery Evans,) and the heirs and assigns of her, the said Ann Evans forever; in like manner, I give one thousand dollars." But thus framed, it must be observed, that this latter clause, would be imperfect of itself, and a reference to the preceding, would be indispensably necessary and proper to render it intelligible, and to get at the meaning and intention of the testator, for the legatee is not even named in it. In the will as it is drawn, we have an instance of this in the two clauses embracing the land and the goods, which are connected by the word, "also," which is obviously used there as a mere copulative. In the latter clause, embracing the goods, the agent or testator and the verb, indicating his act and will, do not appear, without which it is unintelligible and unmeaning, and to supply the omission, you must refer to the prior; and again in the latter, the *tenendum* is introduced, and the trust with its nature declared, which are not contained in the clause embracing the land, but by means of the copulative "also," are to be connected with it as well as the goods. Thus the imperfection in the second clause, renders a reference to the first necessary, and this relationship and dependence being once established between them, they are to be considered and construed as the component parts of one complete sentence mutually aiding and giving light to each other. Here we have this sentence in the will disposing of the land and the goods, which is perfect and complete; and the subsequent clause, which is the one giving the thousand dollar legacy, is equally so. And this latter is in no wise dependent upon the first, to make it more complete and more intelligible than it would be without any such clause or sentence as the first being in the will at all. Now it will be found upon reference to the

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[*70] authorities, that it is only where *the first sentence is complete, and the second so imperfect, or *vice versa*, as not to be intelligible without referring to the first or the one that is perfect, in order to supply the defect, that the word "also," can ever have the meaning of the words, "in like manner," given to it, or in causing the one clause to govern and direct the other. As in 1 Roll. Abr. 844, Tit. Estate by Devise, (M.) pl. 2. "If a man devise Blackacre to one in tail, and also Whiteacre; the devisee shall have an estate tail in Whiteacre; for the whole is but one sentence, and so the words which make the limitation of the estate belong to both." Trin. 40, Eliz. B. R. cited by Fenner, Just. to have been decided in bank. So in *Cole v. Rawlinson*, Holt, 744; s. c. Ld. Raym. 831, and 1 Salk. 234, decided in B. R. 1 Anne, where the testator "gave all his estate, right, title, and interest, which he then had and all the term and terms of years which he then had or might have in his power to dispose of after his death, in whatever he held by lease from Sir John Freeman, and also, the house called the Bell tavern to John Billingsley." It was ruled by the three *puisne* justices; contra, Holt, C. J., that the devisee took a fee in the Bell tavern, "because, as they say, it is but one sentence, coupled by the words, "and also," and governed by one verb, whereby the proposition in, is carried unto the Bell tavern, so that it is a devise of all the testator's leasehold estate, and also in the Bell tavern." See 1 Salk. 234, and 2 Ld. Raym. 832. In both these cases, the first clause, it will be observed, is perfect, but the second being altogether imperfect, rendered a reference of it to the first necessary, and becoming thus connected with it, they both make a whole sentence and as such were construed. Again in *Moore*, 52, 53, pl. 153, as early as Pasch. 5 Eliz. This case is put by Dyer, Chief Justice, in the following form: "Item. I give the manor of D. Item. I give the manor of S. to I. K. and his heirs." Here, it will be observed, that the first clause is the imperfect one, and to render it intelligible, a reference must necessarily be had to the second, which makes it complete. The first is defective in not giving the name of the devisee, and the word, "Item," is used as a copulative to connect it with the second clause, which gives the name of the devisee, and the quantity of estate intended for him, thus making the whole but one devise, and giving to the devisee a fee simple in both manors, as he said.

Now it is plain, that the cases cited from *Shep. Touch.* fall directly within the principle of these cases just referred to, because the same imperfection appears in either the first or second clause of each of them, and renders it therefore necessary to refer to the one, in order to make sense of the other.

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But if a man devise in this manner, "Item. I give my manor of Dale to my second son. Item. I give my manor of Sale to my second son and his heirs," the devisee shall only take an estate for life in the manor of Dale, but a fee in the manor of Sale. So held by Dyer, Chief Justice, and two of the *puisne* Justices. Brown, Justice, dissenting, *Pasch. 5 Eliz.; Moore 52, 53, pl. 153, and considered the word, "Item," as merely [*71] indicating a new devise.

So if "I devise Blackacre, to my daughter F. and to the heirs of her body engendered. Item, I devise unto my said daughter Whiteacre; she shall have an estate for life only in Whiteacre, for as the court said, the word 'Item,' is not equivalent to in the same manner." Trin. B. R. 40, Eliz. *per curiam*. 1 Roll. Ab. 844, Tit. Estate Devise, M. pl. 1. See also, 1 Mod. 100, and 1 Sid. 105, per Just. Windham, to the same effect. Here each clause is perfect and intelligible of itself, and must be construed according to the language employed by the testator in each. And the word "Item," imports nothing more than "moreover," "beside," or, "in addition thereto," and is used as I have already said, to show that what follows it, is intended to be in addition to that which precedes or otherwise, as Lord Hardwicke has said, 3 Atk. 438, "is only made use of to distinguish the clauses in the will."

In *Spirit v. Bence*, decided in the time of 10 Car. 1 Trin. B. R. Cro. Car. 368, on a devise of "all my pasture lands in D. to my youngest son, Henry, And also all bargains, grants, covenants, which I have from B. my son Henry shall enjoy and his heirs forever;" it was held that Henry took only an estate for life in the pasture lands in D. And the court there said that the word "also," was no more than the word "and," and should not extend to the quantity of the estate. Again in *Hopewell v. Ackland*, 1 Salk. 239, and reported also in Com. Rep. 164, where in the argument in page 166, the distinction which I have mentioned, is supported and illustrated with great force and perspicuity. The testator there devised as follows: "I devise my manor of Bucknall to A. and his heirs. Item, I devise all my lands and hereditaments to the said A. Item, I devise all my goods and chattels, money and debts, and whatever else I have not before disposed of to the said A., he paying my debts and legacies." It was urged that the word "Item," conjoined the sentences and carried on the testator's intent, and imported a meaning to give the like estate, as was before expressed in the preceding sentence. But, Trevor, Chief Justice, who delivered the opinion of the court, said, "Item, is an usual word in a will to introduce new distinct matter; therefore a clause thus introduced is not influenced by nor to influence a precedent or

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subsequent sentence, unless it be of itself imperfect and insensible without reference; therefore, not here, when both clauses are perfect and sensible." And for this reason the court held that the second clause conferred on A. only an estate for life, notwithstanding he took a fee in the manor of B. under the first clause; and likewise, again in the third, under the words, "whatever else I have not disposed of," between which and the second clause, the word "also," was introduced a second time.

In *Childs v. Wright*, 8 Term R. 64, where the testator devised as follows: "I give and devise unto my grandson, I. W., all my lands, freehold, copyhold, and leasehold in A. Also, I [*72] give and devise unto *my grandson, I. W., all my estate, freehold and copyhold in B.," it was held that I. W. took only a life estate in the devisor's estate in A. although he had a fee given to him by the immediately succeeding clause under the term estate in the lands in B., and it is not even suggested that the word "also," ought to make it otherwise. Each clause was perfect of itself; and therefore, although the word "also" stood between them, it could give the one no bearing or influence upon the other.

The last case to which I will refer on this point, is *Fenny v. Eustace*, in 4 M. & S. 58, where the rule and the distinction with respect to the use and meaning of the word "also" in wills, is fully recognised and applied by the court as in the cases previously stated.

The husband is bound for the payment of the wife's debts. He is bound likewise to support and maintain her under all circumstances; and the law having imposed these obligations and duties upon him, has at the same time, gone so far in furnishing the means, as to give him a right absolutely to all her personal estate, as well as a right to the use of her real estate, at least during the coverture; of which he is not to be deprived without clear and unequivocal evidence, that it was the intention and will of the donor to give it to the wife, so that it should not be subject in any way to the control of the husband. Mr. Roper says, "courts of equity will not deprive the husband of the right to participate in his wife's property, unless a clear intention be manifested by the testator that the husband is not to derive any benefit from the disposition." 2 Roper on Leg. 296.

The Vice-Chancellor in *Lumb v. Milnes*, 5 Ves. 520, 821, says, "The point is, whether there is anything to show, the husband was not intended to be entitled to what every husband is entitled to; at least a participation by him with his wife, whose debts he is bound to discharge, and whom he is bound to maintain. It is necessary to show a decided intention, that the husband shall have no interest whatever."

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So far as rules have been adopted and settled in the construction of wills, it is no doubt greatly for the interest of the community, that we should abide by them, for they are and ought to be so considered, as part of our landmarks. Indeed, it has often been regretted by some of the best and most experienced judges, that the same technical words and rules had not been adopted and required in respect to the making and construction of wills that prevailed in regard to deeds, as it would have prevented many disputes which have arisen and will still continue to arise from these sources.

Although in construing wills, the intention of the testator is the cardinal or governing rule, yet there are also some rules on this subject of a fixed character; one indeed, which in most instances where it is applicable, is thought to be opposed to the intention of the testator. For example, a devise of land *eo nomine* to a person without words of inheritance, or other expression, declarative of the quantity of estate, which the devisee shall have in the land, gives to him by *a fixed rule of construction, only a life estate, when it is believed in [*73] most cases of the kind, that a fee was intended by the testator. It is also a rule, as I conceive, particularly applicable in construing wills, because strongly indicative of, and subservient to, the testator's intention, that when he has in one part of the will shown his knowledge of the technical form used in drawing a devise or bequest with a view to accomplish a precise and definite object by using and adopting it, and again in another devise or bequest in favour of the same person, uses words, that without the first being employed in the same will, would not be held to be of the same import; or even uses words in the second case of doubtful import, such as might or might not have been intended to mean the same thing with the technical form of words used in the first devise or bequest, the design and intention of the testator must be considered different in the second case from what it was in the first, and the effect will not be the same in both cases; because it cannot be supposed that a man of the least sense, would use terms of dubious import, to express the same purpose, after showing that he was acquainted with the technical language used for declaring it with positive and absolute certainty. This rule was applied in the case of *Wills v. Sayres*, 4 Madd. 409, (American Ed. 216,) where the testator bequeathed to the defendant six hundred pounds stock upon trust, to apply the dividends for the sole and separate use and benefit of his daughter, who was a *feme covert*, and her receipts were to be sufficient discharges; and then bequeathed the residue of his personal estate and effects, after payment of his debts, &c., to her "for her own use and benefit;" it was held by the

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Vice Chancellor, that these latter words used in the residuary bequest, did not give to her a separate estate; stating as a reason, "that the testator, as to the same person, with respect to another gift, had appointed a trustee and expressly directed the application of it to her sole and separate use; he knew therefore, the technical form of excluding the right of the husband," and his Honour said, "he could not infer that as to the residuary bequest, the testator intended what he had not expressed." The case of *Roberts v. Spicer*, 5 Madd. 491, (American Ed. 298,) was ruled in the same way upon the same principle or rule of construction.

Now it appears to me, that whether we regard the rules that have been applied to the construction of wills, or the intention of the testator himself, as our polar star, we cannot undertake to decide that it was certainly the intention of the testator to give the legacy of one thousand dollars to George Knorr, for the sole and separate use of his daughter, Mrs. Evans. The intervention of the trustee of itself, as we have seen, is not sufficient for that purpose. The rule of law is clearly in favour of the husband, that a gift or bequest to the wife, is in effect a gift or bequest to the husband, and he cannot be deprived of it without an unequivocal intention manifested by the donor or the testator, that he is to have no interest or part in it. The testator has shown us here from the manner in which he has disposed [*74] *of the land and goods in favour of his daughter to her sole and separate use, that he knew perfectly well how to declare and set it forth in such legal, precise, and technical form, as to render it impossible to raise even a cavil against it; but when he comes to give the thousand dollars, he leaves out the important and definite terms "sole and separate," which he had before so carefully inserted with respect to the land and the goods. No other rational motive can be assigned for this, but design on the part of the testator.

But even if it were doubtful, whether he intended this money for her sole and separate use, still the husband is entitled to it. The circumstance of the testator's giving it to the trustee, and not directly to the husband or the wife herself, is not a sufficient reason to authorize us to declare that he intended it for her sole and separate use. *Torbert and Twining*, was a much stronger case than the present in favour of the wife's sole and separate claim. For there the testator had first made his will, giving the property directly to the wife herself, and afterwards made a codicil, by which he gave it to trustees for her use, benefit, and behoof, without making any other apparent alteration of his will. It is highly probable, that by this alteration, he thought he had put the property beyond the control of the husband, and secured

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it for the separate use of the wife; or why should he have given himself the trouble of making the change that did not alter the effect, unless for the purpose of excluding the husband from all participation in the enjoyment of it? But then this is not to be considered a sufficient manifestation of the testator's intention to defeat the husband of his marital rights. In the present case, the trustee was introduced in the first instance, and the use that is made of him in respect to the land and the goods, shows to demonstration almost, that the testator understood perfectly what he was doing, and what the law required on this subject; and that when he intended to give for the separate use of the wife, it was necessary in order to have his intention carried into effect with certainty, to declare expressly, that it was for her sole and separate use, but when he did not so intend, it was sufficient to omit these exclusive and technical words. And this dereliction of them, repels all presumption that might otherwise have arisen in favour of the wife's separate use, from the circumstance of giving it to the trustee.

Judgment for the plaintiffs.

Cited by Counsel, 1 Wh. 101, 181; 2 Wh. 15; 10 Barr, 222; 7 C. 232; 18 S. 328; 29 S. 30; 1 N. 95; 11 W. N. C. 184.

Cited by the Court, 1 Wh. 23, 264; 5 Barr, 387; 3 H. 499.

*[PHILADELPHIA, FEBRUARY 4, 1833.]

[*75]

Neide *against* Neide.

APPEAL.

Testator devised as follows:—"Principally and first of all, I give and bequeath to my eldest son, J. N., my late purchase from E. C., as also four acres of woodland being in a corner," &c. The land purchased from E. C., was purchased in fee simple, and held, that a fee passed to the devisee, both in the land purchased from E. C., and in the four acres of woodland.

THIS was an ejectment for land, in *Delaware* county, brought by Joseph Neide against Jacob Neide. On the trial of the cause in the Circuit Court of that county, the following case, in the nature of a special verdict, was stated for the opinion of the court:—

"Joseph Neide, the elder, being seized of the premises mentioned in the declaration, (about twenty-eight acres eighty-eight perches,) duly executed his last will and testament, written by

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his own hand, on the 19th day of May, 1796, which was duly proved and recorded on the 29th of September, 1798, (prout the said will as follows:)

“In the name of God, Amen. I, Joseph Neide, of Delaware county, in the state of Pencilvania, being in perfect helth of body and sound mind and memory, thanks be to God, therefore, do this nineteenth day of May, in the year of our Lord Christ one thousand seven and ninety-six, make and publish this my last will and testament in manner following, to wit: principally and first of all, I give and bequeath to my eldest son, John Neide, my late purchases from Elizebeth Claxton, as also, four akers of woodland, being a corner, lying between the Bristo field and Sharplesis’ land, further, I give to my son, John Neide, the corner piece of mash from the cross bank out to lo low-water mark, with a privilege to pas and repas to and from said mash, through the plantation, also to quarry stone be on the side of said mash, as allso, I give and bequeath to my son John, one hors and one cow.—Secondly, I give to my daughter Mary, the sum of one hundred pounds, to be paid out of my estate at different times within the space of five years after my deceace.—Thirdly, I give to my daughter Rebecka, the sum of eighty pounds, to be paid in eight years, at ten pounds a year.—Fourthly, I give and bequeath to my daughter Elizebeth, the sum of one hundred pounds, to be paid in eighteen months after my deceace.—Fifthly, I give and bequeat to my daughter Abegal, the sum of fifty pounds, when she shall arive at the age of twenty-one years, and if she should die before that time, to be divided among the living.—Sixtly, I give to my son Jacob, the sum of fifty pounds, to be paid to him in one month after my deceace.—[*76] *Seventhly, I give and bequeath to my son Benjamin, twenty akers of land, to be taken in the Bristo field, to begin at William Swaffers’ line, and running from thence by the percimen tree to the great road.—Eightly, I give to my granddaughter, Elizebeth Evans, hur maintainnace til she shall arive to the adge of eighteen years, to come out of my estate by my executor.—Ninthly, I give to each of my granchildren, of my daughter Sarah, one silver dollor a peace.

“Farther, I give and bequeath to my mulatto boy Tom, the sum of five pounds, to be paid by my executor.

“And I do give and bequeath the remainder of my lands not heiretofore willed, to my son, Joseph Neide, but in case he should die without issue, then my son, John Neide, shall have two shairs, and the remainder to be equealy devided amongst the survivors, and further, I do constitute and appoint my son, Joseph Neide, sole executor of this my last will and testament, hereby revoking

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all other wills and testaments hereunto by me maid. I witness whereof, I have hereunto set my hand and seal.

JOSEPH NEIDE, [L. s.]

“Signed, seald, published, and declared in presence of William Kerlin, John Caldwell, Pierce Powers.”

“Joseph Neide, the elder, died in the year 1798, and John Neide, took possession of the premises laid in the declaration. He died in possession on the 24th of September, 1830.

“Joseph Neide, the younger, mentioned in the will of the testator, died in the year 1806.

“The plaintiff is the only son of Joseph Neide, the younger, who entered into possession, under the will of his father, of between two and three hundred acres of land in the township of Chester, not being the same land mentioned in the declaration.

“‘The purchase,’ made by Joseph Neide, the elder, of Elizabeth Claxton, was of twenty-three acres and sixty-two perches, in fee simple; as per deed of 16th June, 1785.

“John Neide, by his last will, dated 24th of September, 1830, devised to the above defendant, all his estate, real and personal, in fee simple.

“Joseph Neide, the elder, at the time of his death, had eight children.

“Of these, the following now survive, viz. : Ann Mary, (now Evans,) Rebecca, (now Dicks,) Abigail, (now Hall,) Jacob, and Benjamin.

“The following are deceased, leaving issue :—Elizabeth, who left seven sons, Joseph, who died intestate, leaving the plaintiff, his only son and two daughters; one of whom is since deceased without issue.

“The following died in the lifetime of the testator :—Sarah, (who married Elisha Evans,) leaving issue, five children.

“John Neide, died as aforesaid, without issue. At the time of the making of the will of Joseph Neide, the elder, and at the time of *his death, his son, Joseph Neide, the younger, [*77] was unmarried, and without issue.

“The quarry referred to in the devise to John Neide, is not on the premises laid in the declaration.

“POINTS.

“1. The plaintiff contends that under the will of Joseph Neide, the elder, John Neide, took but an estate for life in the premises laid in the declaration.

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"2. That Joseph Neide, the younger, took in those premises an estate tail.

"The defendant denies both these propositions, and contends that John Neide took in those premises a fee simple.

"By agreement, such judgment is to be entered as the law and the facts will warrant."

The judge who held the Circuit Court, for the purpose of bringing the case before the court in bank, gave judgment for the plaintiff, and an appeal was entered by the defendant from his decision.

Dick and Tilghman, for the appellant:—John took a fee. The will was written by the testator himself, who, though an illiterate man, has made his intention manifest. It is the right of every man to make his own will, and to express his meaning in his own way. If the intention plainly appear, and be not contrary to the policy of the law, it must be carried into effect, no matter how awkwardly it may be declared. An unlettered man often uses words in a different sense from that in which they would be understood by a grammarian or a lexicographer, and it is the business of courts to endeavour to ascertain the meaning affixed to them by the person by whom they are employed, and to give them effect accordingly. *Morrison v. Semple*, 6 Binn. 97; *Steele v. Thompson*, 14 Serg. & Rawle, 98; *Cassell v. Cooke*, 8 Serg. & Rawle, 289. The question then is, what did the testator, Joseph Neide, mean by his devise to his son John? His intention is to be gathered from the will alone, and from the whole will, and it is so clearly expressed, that no plain man, whose mind is not narrowed by legal technicalities, can entertain a doubt on the subject. The testator was an uneducated old man, the father of nine children, and sat down to make a disposition, in his own way, of all his property, and a provision for all his children. His main intent is to provide for his eldest son, the primary object of his bounty, the devise to whom is introduced with very remarkable language, strongly serving to illustrate his views. The words "principally, and first of all," would not be satisfied by giving to John, in reference to whom they are used, merely an estate for life, in the property devised to him. The subject of the devise to John is, the testator's "late purchase" from Elizabeth Claxton. It is impossible that he should have intended, by these words, to describe either the locality or the extent of the land he had purchased; he must have meant, that John should have all his estate and property in it; all that [*78] he *acquired by that purchase, he gave to his eldest son, and as he purchased an estate in fee simple, he gave an estate in fee simple, by that devise. Wherever the words of the

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will describe merely the situation of the property devised or serve to identify it, an estate for life passes, but where they refer to the interest of the testator in it, they pass that interest; thus "estate," "effects," "substance," "all I have in the world," with many others of similar import, carry a fee. 3 Preston on Abst. 158; 2 Preston on Estates, 87 to 187; Bailis v. Gale, 2 Ves. Sr. 48; Scott v. Audrey, 3 Atk. 493; 2 Lev. 91.

The twenty-three acres purchased from Elizabeth Claxton were the principal devise, and having ascertained the estate which the devisee took in that, the question is determined as to the interest he acquired in the four acres of woodland, subsequently devised. The latter was an accessory to the former, and followed its nature. Whatever estate was given in the one, was given in the other. The two devises are connected by the word also, which is synonymous with in the same manner, and consequently, if a fee is given in the purchase from Elizabeth Claxton, a fee is given, in the same manner, in the four acres of woodland. If an estate for life only was given in the woodland, John would have the burthen of paying taxes imposed upon him, without deriving the smallest advantage from the devise, and as it is supposed, that a benefit is intended by every devise, the court will not give to a will such a construction as that contended for on the other side, unless the language of the testator imperatively requires them to do so. The intention of the testator, with respect to the devises in question, is further shown by other parts of the will. After having disposed of his real estate, he proceeds to make a disposition of his personal property, and couples the two descriptions of property by the word also; also, "I give and bequeath to my son John one horse and one cow;" that is, in the same manner that I have given him the land, I give him the personal property, and as the estate given in the latter was absolute, that given in the former was absolute too. This is the only construction which will insure harmony and symmetry; any other will produce discord, confusion, and absurdity. If, according to the opposite construction, John takes an estate for life, with a remainder in tail to Joseph, then John, in the event of Joseph dying without issue, is to take two shares of an estate which is not to be brought into existence until after his death, and yet it is the same estate of which he is to enjoy the whole during his life. This is the conclusion at which the opposite argument must necessarily arrive, and it is so absurd as to destroy the argument altogether. They also cited 2 Preston on Estates, 103, 104; Pells v. Brown, Cro. Jac. 590.

Engle and J. R. Ingersoll for the appellee. It is to be la-

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mented, that the adoption of the English rule, in the construction of devises, should in Pennsylvania, so frequently defeat the intention of the testator ; but judges are not legislators, and it is [*79] now too well settled to *be disputed, that a general devise of land, without limitation, passes only an estate for life. The will under consideration, contains no words, legally denoting an intent to give a fee simple. The word, estate, which it has frequently been decided carries the fee, refers not only to the subject-matter of the devise, but to the duration of interest. But the word, purchase, conveys no idea of interest. It is merely a term of description, used to distinguish the particular property devised from other property. *Loveacres v. Blight*, Cowp. 355 ; 2 *Preston*, 69 ; *Morrison v. Semple*, 6 Binn. 97 ; *Steele v. Thompson*, 14 Serg. & Rawle, 84. A devise of a certain number of shares, in the New River, a word much more comprehensive than purchase, was held in *Middleton v. Swain*, *Skinner*, 339, to give only an estate for life. The intention to give a fee simple, must be clear and unambiguous, otherwise the rule of law must take place. There must be express words or necessary implication to defeat the title of the heir at law. If the language be of doubtful import, he cannot be disinherited. The devise in question, has no words indicating an intent to give an inheritance, and there is nothing which by a fair interpretation, can be made to supply the want of them. Where the words are not of themselves sufficient to show an intention to give a fee, it may be inferred from something being superadded, which is obviously inconsistent with the idea of an intention to give a less estate. Such a result takes place where a general devise is charged with the payment of a sum of money ; but in no instance has a word of similar import to the word purchase, been held to pass a larger interest, than an estate for life, unless something in the nature of a charge was superadded to it. *Busby v. Busby*, 1 Dall. 226 ; *French v. M'Ilhenny*, 2 Binn. 20 ; *Lessee of Caldwell v. Ferguson*, 2 Yeates, 250 ; *Doughty v. Browne*, 4 Yeates, 179 ; *Campbell v. Carson*, 12 Serg. & Rawle, 54 ; *Green v. Creamer*, 2 Yeates, 378 ; *Grayson v. Atkinson*, 1 Wils. 333 ; *Right v. Sidebotham*, 2 Doug. 762 ; *Lessee of Burkart and Willis v. Bucher*, 2 Binn. 455 ; *Lessee of Willis v. Bucher*, 3 Wash. C. C. R. 369.

Joseph had an estate tail by necessary implication. The intention was to provide for his issue, which could be effectuated only in this way. The court must give a construction to the whole instrument, and not such a one as will create an intestacy as to any part of the testator's estate. Everything is embraced in the sweeping residuary devise to Joseph, of "all the remainder" of the testator's "lands not heretofore willed," and in case

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he should die without issue, then over. He had willed to John, only an estate for life, and this devise carried the remainder of the estate in the lands given to him to Joseph, in tail, an indefinite failure of issue being contemplated, which creates an estate tail. *Hopewell v. Ackland*, 1 Salk. 239; *Hyley v. Hyley*, 3 Mod 228; 1 Roberts on Wills, 439, 442; *Attorney General v. Sutton*, 1 P. Wms. 758; *Lessee of Haines v. Witmer*, 2 Yeates, 400.

The opinion of the court was delivered by

*HUSTON, J.—Joseph Neide, the grandfather of the plaintiff and father of the defendant, made his will, [*80] written by himself on the 19th day of May, 1796, which was proved on the 29th day of December, 1798; he was a farmer, and not learned, as appears by the spelling, which is very incorrect. After a short preamble, it contains as follows:—"Principally, and first of all, I give and bequeath to my eldest son, John Neide, my late purchases, from Elizabeth Claxton, as also, four akres of woodland, being a corner laying between the Bristo field and Sharplesses' land, further I give to my said son John, the corner piece of mash from the cross bank out to lo low-water mark, with a privilege to pas and repas to and from said mash, through the plantation, also to quarry stone be on (beyond) the said mash, as also, I give and bequeath to my son John one hors and one cow." He then gave to each of his five daughters a legacy in money; and to his son Jacob fifty pounds to be paid in one month after his decease. Then to his son Benjamin, twenty acres to be taken in the Bristo field, to begin at William Swaffers' and running from thence by the Percimen tree to the great road; then other small devises to some grandchildren, and to a mulatto boy, and proceeds, "and I do give and bequeath the remainder of my lands not heretofore willed to my son Joseph Neide, but in case he should die without issue, then my son John Neide, shall have two shairs, and the remainder to be equally divided among the survivors," and appointed Joseph his executor.

It has long ago been said, that after the statutes of wills in the time of Henry 8, the devisee was called for want of a better term, and to distinguish him from the heir, a purchaser, and the will of a testator was compared to a deed, and the same, or nearly the same, legal accuracy in designating the quantity of estate, was required in a will, which was requisite in a deed. As the now common accomplishment of writing was then rare, and some of the learned must be applied to before a writer could be found, the inconvenience was not in those days great. Within a century, however, more in proportion could write, though they could not

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write in legal phrase; and it became a question, what words pass a fee in a will. Lord Hobart, than whom, says Chief Justice Willes, "a greater man never lived," laid down some principles which are law yet, and beyond which the law has not advanced much, though other expressions than those on which he decided, have been held within the principle he laid down. In Hobart, page 2, *Widlake v. Harding*, the testator devised to his cousin Agnes Harding, and her assigns, his dwelling-house for ninety-nine years, "and my said cousin Agnes Harding, shall have my inheritance, if the law will allow it," and adjudged she took a fee. In page 32 of his reports, we find this expression, "If a devise do sufficiently and certainly show the intent of the deviser in the substance, though the circumstances fail, or be defective, I care not." In page 75, *Spark v. Purnell*, he says: "If by my will I say *J. S.* shall be heir of my lands, he shall have it in fee; this though *J. S.* is no relation."

[*81] *I shall notice only a few of the many cases on this subject, observing that many judges have said, that when an unlearned man gives a horse, and in the same sentence or a different one gives a house, and the courts decide that each shall not hold absolutely and forever, they always disappoint the intention of the testator. I admit, however, that we are not at liberty to decide that a simple devise of lands to a man unconnected with anything else passes a fee, for we would by so doing, unsettle estates for some years back. The legislature alone can do it prospectively.

Where the words used, not only apply to land, but to the quantity of interest which the testator has in it, or which he disposes of, that interest passes. There are many contradictory cases, as between, "I give my estate," and "I give my estate in A.," or, "my estate at A.," but the law seems to have settled down in this, that each of these expressions passes a fee, unless restrained by other parts of the will.—"All my effects"—"whatever else I have in the world;" (*Talbot's Cases*, 286;);—"all I am worth," "what I die possessed of," "what is left after my debts are paid,"—the words, property,—substance, and many others have been held to pass a fee. In short, there has been an astuteness to find a meaning which can justify or excuse the courts in giving a fee where it is plain the testator intended it;—and though some judges have held in some cases that their predecessors had gone too far, and have doubted some of the decisions, yet the current has still set in the same direction, and cases doubted by one judge have been considered clear of doubt by his successors. I refer to the authorities collected in 2 *Preston on Estates*, from 90 to 186, in *Roberts on Wills*, *Powel on Devises*, and many other books.

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It is apparent however that it is not so much the particular word or phrase used, as the context, or the scope of the whole will, which passes the fee; every word and expression in the English language has different meanings in connection with different words or applied to different subjects. The express devise to a man and his heirs and assigns, is often cut down by other expressions or by being applied to a long lease, to estate tail, or to an estate for years; and so a devise without words of addition may carry a fee if the expression used shows that the testator had in view the quantity of interest as well as the description of the property given. The rule once was, that the heir at law cannot be disinherited by any other than express words or necessary implication. In *Fagge v. Heaseman*, Willes, 141, Chief Justice Willes shows, that this rule though often repeated has not been acted on, and is inconsistent with many decisions of judges who have used it, and he says the true rule is, that it ought plainly to appear to be the intent of the testator, or the heir will not be disinherited.

In our own courts the same principles have been laid down in nearly the same words. 2 Binn. 19; 6 Binn. 97; 1 Yeates, 250, 308; 9 Serg. & Rawle, 434, and other cases.

In this will the word heirs nowhere occurs. The words my late *purchase as used, may and naturally do as well as [*82] a description of the property include a description of the estate or interest in the property. The case in 2 Vesey, 48, has nearly the same phrase and was held to pass a fee. But it was contended the devise to Joseph of the remainder of his lands not heretofore willed, showed that John had only a life estate and the remainder to Joseph. The answer is, that he gives to Joseph the remainder of his lands not before willed; not the remainder of his estate in those lands, and further that this construction will make the will absurd. The testator could not have intended to give to John for life, and after his death to Joseph, and after Joseph's death two shares to John. There were other lands not before mentioned to satisfy the devise to Joseph; those lands he gave to Joseph, and no others.

On the whole, we have found no case directly in point. The case above cited in 2 Vesey, 48, is the nearest to it. The very words "I give my new purchase," &c., are put in Hobart, 32, as an example that a fee may pass by those words in a certain connection with other words; we think however that the phrase, "my late purchase," is equivalent to, "what I lately purchased," and that would describe the interest given as well as the property given. "The four acres of woodland" is so coupled with "the late purchase," that it goes as the other does, that is, in fee.

[Neide v. Neide.]

John, then, having devised this property to Jacob, the fee simple is in Jacob, and judgment must be entered for him.

Judgment for the defendant.

Cited by Counsel, 2 Wh. 285; 5 W. 435; 6 W. 199; 10 W. 327; 6 Barr, 415; 4 C. 46; 1 G. 241; 10 S. 278.

Cited by the Court, 1 Wh. 264; 2 Wh. 383; 6 H. 25; 7 H. 92; 12 H. 245.

[*83]

*[PHILADELPHIA, FEBRUARY 4, 1833.]

Bauer and Others *against* Roth and Another.

IN ERROR.

Where judgment is given in favour of the plaintiff on a demurrer to a plea in bar, it should be a judgment *quod recuperet*, and not *quod respondeat ouster*; but if judgment *quod respondeat ouster* be given, it is an error of which the defendant cannot complain, for it is in his favour.

To an action founded on a bond of indemnity *nil debet* is no plea.

It is no cause of demurrer to a special plea, that the facts set forth in it, may be given in evidence under the general issue.

In an action on a bond in indemnity by two obligees, a plea, stating in substance that the defendant, with others (originally bound with him) agreed to join in the execution of the bond to one of the plaintiffs alone to indemnify him, &c., and positively refused to be bound to the other plaintiff in any manner or form whatever to indemnify him, &c., either severally, or jointly and severally with his co-plaintiff, and that neither of the obligors being able to read the English language in which it was drawn up, they all signed it upon trust, and delivered it to the plaintiff to whom they agreed to become bound, without having heard it read or explained or interpreted, and without having requested that it should be, believing that it was written in exact conformity to their previous agreement, but not stating how or why the deviation from the agreement happened, whether by fraud of the plaintiffs or mistake of the scrivener, is not sufficient to bar the plaintiffs' action.

It is no plea against the further maintenance of an action, that one of the plaintiffs, since its institution, has applied for and obtained a discharge under the insolvent laws, and that his trustees have not given the security required by law.

A mere irregularity in point of time, in putting in a plea *pais darrein continuance*, is no cause of demurrer to the plea, whatever it might have been for setting it aside on motion; but the power to set it aside may be questioned since the act of 21st March, 1806.

Query, whether in Pennsylvania, a plea *pais darrein continuance* is a waiver of a previous plea in bar.

The obligors in a bond reciting that the obligees, together with M. are bound in seven obligations to the heirs of C. R. to be paid by the said M. and conditioned that he shall pay them on the days and times mentioned therein, and also to keep harmless and indemnify the obligors from all suits, payments, costs, and charges, in behalf of the recited obligations, are responsible for the default of the principal debtor in those obligations, though they may have passed into the hands of assignees.

There is no error in instructing the jury in reference to the defendant's liability on such a bond of indemnity, that "the plaintiffs' claim for damages does not rest on the ground of injury done them by reason of their liabilities as sureties for M. and on the neglect of M. to pay the heirs of C. R. The measure of damages is the amount of injury actually sustained."

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Nor is there error in charging the jury, that in strictness of law they might give the plaintiffs the full amount due in each of the actions on the recited obligations, mentioned in the breaches assigned in the declarations in the suit on the bond of indemnity, at the commencement of that suit, recommending to them, however, if they should find for the plaintiffs, to regulate the amount of the damages by the amount of moneys actually paid out by the plaintiffs, with interest from the time of such payments; the jury having adopted the recommendation and found a verdict accordingly.

FROM the record returned on a writ of error to the Court of Common Pleas of *Northampton* county, it appeared, that to April Term, 1821, of that court, Peter Roth and John Roth brought an action of *debt on bond against Jacob Bauer, [*84] George Keim, and Jacob Miller, the plaintiffs in error. The original writ, which was a summons, was served on Bauer and Miller, but not on Keim. The plaintiffs' attorney filed a declaration, in which he set forth the bond and the condition at large. The condition was as follows :

"Whereas David Musselman, by seven certain obligations bearing even date herewith, together with the said Peter Roth and John Roth standeth bound unto the heirs of the said Conrad Roth in the above sum of three thousand nine hundred and sixty-two dollars and sixty-nine cents, current money of Pennsylvania, aforesaid, to be paid by seven instalments, which said money is to be paid by the said David Musselman, his heirs, executors, and administrators. Now the condition of the above obligation is such, that if the said David Musselman shall pay, or cause to be paid, the said above-mentioned debt or sum of three thousand nine hundred and sixty-two dollars and sixty-nine cents, on the days and times mentioned in the said several obligations to the said heirs of the said Conrad Roth, deceased, and if the said Jacob Bauer, George Keim, and Jacob Miller, their heirs, executors, and administrators shall from time to time and at all times hereafter, keep harmless and indemnify the said Peter Roth and John Roth, their heirs and assigns, their goods and chattels, lands and tenements, of and from all suits, payments, costs, and charges of and in behalf of the said above recited obligations, to the heirs aforesaid, without any fraud or further delay, then," &c.

Several breaches of the condition were also set forth in the declaration by averring the non-payment by David Musselman, of several of the sums of money specified in the condition of the obligation given to the heirs of Conrad Roth, according to the tenor thereof, and that the plaintiffs had actually been compelled by suit to pay certain sums, which are mentioned, besides being sued for certain other large sums, which still remained unpaid. To this declaration, Bauer and Miller, by their attorney,

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pleaded covenants performed, with leave to give the special matter in evidence, upon which issue was taken.

Some years afterwards, Jacob Bauer, one of the defendants below, having in the meantime died, Jacob Miller the other defendant, added the plea of *non est factum*, and *nil debet*, and a special plea in the following terms: "That he ought not to be charged with the said debt, by virtue of the said supposed writing obligatory, because he says, that before and at the time of the making of the said supposed writing obligatory, the said Jacob Bauer, George Keim, and Jacob Miller, consented and agreed to become bound to the said Peter Roth, to indemnify the said Peter, but protested against and expressly refused to become bound to the said John Roth, or to the said Peter and John conjunctively, under condition to indemnify the said John or the said Peter and John, or under other condition, or otherwise to become bound to the said John, or to the said Peter and John, as in the supposed writing obligatory by the said Peter and John in the court here shown is contained; and the said Jacob Miller, who survived and further saith, that at the time [*85] of the making of the said *supposed writing obligatory by the said Peter Roth and John Roth in court here shown, they, the said Jacob Bauer, George Keim, and Jacob Miller, were unlettered men, not understanding the English language, and believing the said supposed writing obligatory was written according to the form and effect of the said agreement and understanding of them, the said Jacob Bauer, George Keim, and Jacob Miller, and not otherwise, and not in favour of the said John, conjointly with the said Peter, contrary to the refusal and denial aforesaid, of them the said Jacob Bauer, George Keim, and Jacob Miller, to become bound to the said John, or to the said Peter and John, and believing that the name of the said John, was nowhere contained in the said supposed writing obligatory as a party, and obligee in the same; he the said Jacob Miller, who survived, &c., says, he then and there sealed the said supposed writing obligatory, and delivered the same to the said Peter Roth, as his deed, and not to the said John Roth, nor to the said Peter and John, and so the said Jacob Miller, who survived, &c., says, that the said supposed writing obligatory by the said Peter and John in court here shown, purporting that the said Jacob Bauer, George Keim, and Jacob Miller, granted themselves to be held, and firmly bound unto the said Peter and John in form aforesaid, is not the deed of him, the said Jacob Miller, and of this he puts himself upon the country."

Issue was taken by the plaintiffs below upon the first of these last three pleas; a general demurrer was entered to the second,

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and a special demurrer to the third, for which the following causes were assigned, viz.: "That the matters contained in the said third plea, if true, amount to the general issue and are properly admissible in evidence under the general issue which has been therein first before pleaded by the said Jacob, and cannot be pleaded specially; and that the said third plea, is in other respects uncertain, informal, and insufficient." The defendant below joined in demurrer.

At the same time, another plea against the further maintenance of this action by the plaintiffs below was put in by Miller, stating that Peter Roth, one of the plaintiffs below, since the commencement of the action, and during its pendency, in the year 1824, had applied for and obtained a discharge under the insolvent laws of this state, after executing a deed of assignment of all his property, real, personal, and mixed, to a certain Daniel Steckel in trust for the use and benefit of his creditors, according to the requisitions of the insolvent laws, but that the said Daniel Steckel has never given the security thereby required, to enable him to act in discharge of the trust, but has refused and still refuses to give the same. The plea concludes with praying, "judgment if the said John Roth and Peter Roth ought further to have and maintain their said action thereof against him," &c.

The plaintiffs below also demurred specially to this plea, as signing for cause, that if true it was not pleaded *puis darrein continuance*, as it ought to have been, if sufficient in law, &c.—The defendant joined in demurrer.

*The court below entered judgment on each of the demurrers against the defendant below, *quod respondeat* [*86] *ouster*, which formed the subject of the first of three errors assigned in this court.

On the trial of the cause in the court below, Mathias Gross, one of the subscribing witnesses to the bond declared on, was called by the plaintiffs below to prove its execution. On his cross-examination by the defendant's counsel, he testified as follows:—I recollect that Jacob Bauer said, he only would be security for Peter Roth. It strikes me something was said about it; I was examined before in this case, but cannot recollect properly. I think that John Roth went for Schlachach, as his security, but I am not certain that he brought him. The bond was read to them; I recollect the expression that Bauer made; he said, "thunder would fetch it, for we, our children and grandchildren are bound;" in the German language. He signed it; it was read before he signed it. I cannot say whether Bauer can speak English or not; I never heard him. I was well acquainted with him; saw him very often; cannot say whether

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Miller could speak English or not ; all the conversation we have had was in German. I cannot recollect whether the bond was translated into German or not. I cannot say whether Bauer or Miller could read English or not. I must have read it before it was signed, else he would not have used these expressions. It is my custom to read bonds, especially such bonds as these here. I did a good deal of business as a scrivener at that time. This is the bond (what bond he referred to did not appear) that Schlabach and John Roth signed. John Roth got part of the land, and Bauer would not be security for that part ; he got Schlabach. I certainly made known that they were bound to John and Peter, as executors, according to the bond for the part that Musselman was owing. The writings were all finished in Bauer's house. They employed me through each other. The parties all met there. I do not recollect that any particular person requested me to draw the bond. These are three of the bonds (what bonds the paper-book did not show.) I saw them all executed, as much as I recollect ; I am a subscribing witness to them.

Thomas Kitchen, a justice of the peace, who was also sworn on the part of the plaintiffs below, produced and proved his docket, from which it appeared, that on the 27th April, 1826, John H. Bauer obtained a judgment against David Musselman, John Roth, and Peter Roth, executors of Conrad Roth : Principal, eighty dollars and eleven cents : Interest, three dollars and seventy-seven cents : Costs, one dollar and seventy-two cents. From this judgment an appeal was entered, but never filed in the Court of Common Pleas.

Jacob Crist, to whom this judgment was assigned, was also examined as a witness, and testified that the judgment was *certiorari*ed to court : That afterwards John Roth made payment by the hands of John Rehrey of Moore township, and that he understood John Roth had sold his lands to John Rehrey.

To April Term, 1821, No. 31, George Siess, assignee of Christian *Roth, brought suit against David Musselman, John [*87] Roth, and Peter Roth, on a bond dated August 26th, 1816, in the penalty of one thousand four hundred and forty-four dollars and forty cents. To the same Term, No. 86, Daniel Roth brought suit against the same defendants on a bond of the same date, and in the like penalty. To August Term, 1820, No. 113, Godfrey S. Appelt, assignee, &c., of John Roth, brought suit against David Musselman and Peter Roth, in which judgment was obtained on the 22d of January, 1821, but it was not among the breaches assigned.

David Santee, another witness produced and examined by the plaintiffs below, stated that he heard Jacob Miller and Peter Roth talk together. Miller asked Peter Roth how it came John

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Roth was in that bond. Peter said to Miller, that the securities had nothing to do with John. This conversation took place at Christian's spring, about eight years before this trial. They were distant about five or six rods; they talked long, but the witness did not understand anything else. He heard them distinctly.

Jacob Rixater, who was also examined in behalf of the plaintiffs, swore that he was a constable in the years 1821 and 1822, and received an execution from Justice Kitchen, against David Musselman, John Roth, and Peter Roth, and called on them all. He found goods with John Roth, but not with the other two. He made a levy on the goods of John Roth; he did not sell them but gave them up, and they remained in his possession. John Roth afterwards made a vendue of the goods, and sold them.

David Musselman was also examined for the plaintiffs. His evidence was as follows: I do not now remember what was said, I have forgotten it. I do not know that Bauer said anything to John Roth. As far as I know, he was not willing to have John Roth in it, but I do not remember right. I was present when the bond was signed. I do not remember particularly what was said. I was examined upon the subject, but do not recollect what I said. I suppose it is on paper. There was something said about a mortgage, but I do not recollect what it was. I think the bond was read, but am not sure. I think that Bauer and Miller cannot read English.

The will of Conrad Roth, dated August 17th, 1814, and proved March 28th, 1815, and the discharge of Peter Roth, under the insolvent laws, on the 15th November, 1824, were then given in evidence.

The plaintiffs then called John Windt, who testified that he bought the place of Peter Roth, and kept back part of the purchase-money, which was paid to Appelt, who had a judgment when the witness purchased, for about three hundred and twelve dollars. He bought the place for one thousand six hundred dollars, and paid the balance to Peter Roth. The witness, when he purchased, had common bonds against Peter Roth, to the amount of six hundred dollars. One of the witness's sisters had a part. He was bail for Peter Roth, *to J. Frey, [*88] for near two hundred dollars, which he paid for him, three or four years ago.

A bond dated August 26th, 1816, from John Roth and Daniel Schlabach to John Demuth, in the penalty of nine hundred and fifty-eight dollars and sixty-two cents, and conditioned for the payment of four hundred and seventy-nine dollars and thirty-eight cents; a deed bearing the same date, from the executors

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of Conrad Roth to Jacob Bauer, conveying one hundred and fifty-four acres twenty-eight perches, for the consideration of seven thousand six hundred and seventy dollars; a deed from Jacob Bauer to John Roth, conveying thirty-one acres one hundred and twenty-eight perches, for the consideration of one thousand five hundred and eighty-two dollars and sixty-five cents, and a mortgage dated March 20th, 1820, from David Musselman, to Jacob Miller, Jacob Bauer, and George Keim, upon one hundred and twenty-two acres sixty perches, were also given in evidence.

The court was requested by the defendant's counsel to charge the jury "Whether the defendant is bound, if there be sufficient evidence to believe that the obligors were deceived in their act of executing this deed.

"Also, whether the defendant is liable if there be sufficient evidence to believe that the bonds mentioned in the breaches assigned, and those shown in evidence, are not the bonds against which it was intended to indemnify.

"Also, whether the bond shown to the jury, in which Peter Roth is obligee and David Musselman and John Roth are obligors, is within the condition, and whether the jury should not lay it entirely out of their consideration.

"Also, whether the defendant is responsible for any default of David Musselman, in regard to the assignees of any of the said obligations.

"Also, whether the plaintiff's claim for damages, does not rest solely on the ground of injury done to them by reason of their liability as sureties of David Musselman, and not at all on the mere neglect of Musselman, to pay the heirs of Conrad Roth.

"Also, whether the plaintiffs are entitled to recover at all, if it appears that one of them had assigned his property under the insolvent law, since the execution of the bond, on which the suit is brought."

The court delivered to the jury the following charge: "It appears that a person of the name of Conrad Roth, of Bushkill township, died testate some time in the year 1815. By his will he constituted John Roth, Peter Roth, and David Musselman, his executors, who with the consent of the widow, sold the farm of which the testator died seized, to Jacob Bauer, for the consideration of seven thousand six hundred and seventy dollars and twenty cents. Jacob Bauer conveyed part of this property, to wit: thirty-one acres and one hundred and twenty-eight perches, [*89] to John Roth, for the consideration *of one thousand five hundred and eighty-two dollars and sixty-five cents, and also conveyed to David Musselman the residue of the tract, con-

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taining one hundred and twenty-two acres and sixty perches. It appears that one Daniel Schlabach became security for John Roth, for the amount of money which he had to pay out to the heirs; and that Peter Roth and John Roth became security for David Musselman in certain bonds which he gave to the heirs of Conrad Roth, for their shares in the property conveyed to him; and that Jacob Bauer, George Keim, and Jacob Miller, became back-bail to them by the bond upon which the suit now trying is brought. This cause was tried some years ago, and was removed by writ of error to the Supreme Court: and as it is the wish of the court to give you every information relative to the case in their power, I will turn your attention to parts of the opinion of that court, on that case, as delivered by Judge Duncan. (Here the court read from the opinion of the Supreme Court, in the case of *Roth et al. v. Bauer et al.*, 15 Serg. & Rawle, 104, 105, 106, 107.)

“From this case it appears that the Supreme Court have put the construction of law upon the bond in controversy.

“There are three questions for your determination.

“1. Is the bond the deed of Jacob Miller, or not?

“2. If so, the question of damages arises, which is for your consideration, and

“3. If the bond is found to be the deed of Jacob Miller, and there is a breach of the condition of it, what should be the form of the verdict?

“As to the first point. It appears that Matthias Gress, Esq., is a subscribing witness to the bond; and he states that it was signed, sealed, and delivered by Jacob Bauer, George Keim, and Jacob Miller, in his presence; that he has some recollection that Jacob Bauer said he would not go security for John Roth, and shown by a cancelled bond produced by the plaintiffs, that Daniel Schlabach did actually become security for John Roth, that Daniel Schlabach was sent for to go his bail, and it is for the money he had to pay out for the thirty-one acres and a hundred and twenty-eight perches. David Santee has been called as a witness on the part of the defendants, and examined before us in relation to this subject, as has also David Musselman.” (Here the court stated to the jury the substance of the testimony of David Musselman and David Santee.)

This is the substance of the evidence as to the execution of the bond. Should the jury be of opinion with the plaintiffs on this part of the case, that Jacob Miller duly executed the bond in this suit, the question of damages for the breaches assigned, next arises. Justice Thomas Kitchen has produced his docket before us, and has stated that an action was instituted before him, by John H. Bauer, against David Musselman, John Roth, and

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Peter Roth, for one instalment due upon a bond given by them, which it rather appears was one of the bonds against which the [*90] plaintiffs were intended to be indemnified *by the bond in suit. Upon this action, judgment was rendered by the justice on the 27th of April, 1820, for eighty dollars and eleven cents debt, one dollar and seventy-two cents costs. This judgment was subsequently assigned to Jacob Christ, who has appeared before us, and testified that the judgment was *certiorated* to court: That afterwards John Roth made payment by the hands of John Rehrig of Moore township; and that he understood John Roth sold his land to John Rehrig. It seems that an execution on this judgment was issued and put into the hands of David Rixater, who has appeared before you and testified. (Here the court stated the substance of his testimony.)

“This is the substance of the evidence, so far as relates to this judgment before Justice Kitchen. There were two actions commenced upon two of the bonds given by David Musselman, Peter Roth, and John Roth, one to Christian Roth, and the other to Daniel Roth; both which actions were commenced before the institution of this suit. (Here the court stated the action to April Term, 1821, No. 31, brought by George Seiss, assignee of Christian Roth v. David Musselman, Peter Roth, and John Roth, and the bond upon which it was founded, dated 26th August, 1816, and also the action to the same Term, No. 86, at the suit of Daniel Roth, against the same defendants, and also the bond upon which it was founded, dated 26th August, 1816.)

“The court are of opinion that in strictness of law, the jury may give the plaintiffs the full amount due in each of those actions at the commencement of this suit; but I had rather that those claims should be tried in a subsequent *scire facias*, when the proof will be more full than now exhibited, for you will recollect that the plaintiffs, in giving these records in evidence, could go no further than the institution of the suits.

“3. If you should be of opinion that the bond in suit is the deed of Jacob Miller, and that a breach of the condition of it has occurred, the plaintiffs would be entitled to damages, and a verdict for the penalty to secure any damages which may have happened after the bringing of the present action, or which may hereafter happen; a *scire facias* must issue to recover such damages after the commencement of this action. To such *scire facias* the defendant may make any defence which arose since the commencement of this action, and was not the same that had been before tried and decided.”

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The following answers were given by the court to the questions propounded for their opinion :

"1. That if the bond was obtained by fraud, imposition, or deceit, it will not bind the obligors ; but fraud is not to be presumed.

"2. We answer the second proposition favourably to the defendants, as to the principle of law stated, but can see no evidence of the fact, hypothetically stated ; the facts, however, are the exclusive province of the jury.

"*3. The Supreme Court have set this point to rest [*91] by their decision in this very case. There is nothing to avail the defendant in this point ; but this bond cannot be taken into consideration, as it is not set forth in the breaches assigned.

"4. We do not think that there is anything in this point. The indemnity is against the bond, into whosever hands it passes.

"5. We are of opinion that the plaintiff's claim for damages, does rest on the ground of injury done them by reason of their liabilities as sureties for Musselman, and on the neglect of Musselman to pay the heirs of Conrad Roth. The measure of damages, is the amount of injury actually sustained.

"6. This being a joint suit, the circumstance of one of the plaintiffs having taken the benefit of the insolvent laws since the institution of this suit, for such has been the proof, notwithstanding the omission to state that fact in the point, cannot prevent the plaintiffs from recovering. The court can exercise a control in directing Peter's interest in the sum recovered to go to his assignee, on his properly qualifying himself to act."

The jury rendered a verdict for the plaintiffs, and assessed damages on the breaches assigned in the declaration, at one hundred and twenty-eight dollars and eighty-three cents. Judgment was entered for the penalty of the bond, and that the plaintiffs have execution against the defendants for the damages assessed by the jury, &c.

The errors assigned in this court, were as follows :

"1. The court erred in adjudging the plea of *nil debet* insufficient and in awarding judgment of *respondeat ouster*.

"2. The court erred in adjudging the special plea of *non est factum* insufficient, and in awarding the judgment of *respondeat ouster* thereon.

"3. The court erred in adjudging the plea, setting up the insolvency of Peter Roth, one of the plaintiffs, insufficient, and in awarding judgment of *respondeat ouster* thereon.

"4. There was error in charging the jury, that the suit being joint, the circumstance of one of the plaintiffs having taken the

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benefit of the insolvent laws, since the institution of the suit, cannot prevent the plaintiffs from recovering.

"5. There was error in charging the jury that the indemnity is against the bond, into whosever hand it passes. The court should have charged that the defendant is not responsible for the default of David Musselman in regard to the assignees of any of the said obligations.

"6. There was error in charging the jury that the plaintiffs' claim for damages does rest at all on the neglect of Musselman to pay the heirs of Conrad Roth. The court should have charged that their claim for damages rests solely on the ground of injury done them by reason of their liability as sureties of David Musselman, and not at all on the mere neglect of Musselman to pay the heirs of Conrad Roth.

"7. There was error in charging the jury that in strictness of law, *they might give the plaintiffs the full amount due in [*92] each of those actions mentioned in the breaches assigned at the commencement of this suit.

After argument by *Jones* and *J. Sergeant* for the plaintiff in error, and by *Brooke* and *J. M. Porter* for the defendants in error,

The opinion of the court was delivered by

KENNEDY, J.—The judgment given on the demurrers was no doubt wrong, but then the error is not such as the defendant below can complain of, for it is in his favour. The court upon being satisfied that the pleas demurred to were not sufficient in law to bar the plaintiffs of their action, ought, instead of a judgment of *respondet oster*, to have given a judgment of *quod recuperet*. The judgment of *respondet oster* is merely interlocutory and never given either upon a demurrer or a trial of a plea in bar. It is confined to a plea in abatement put in before any plea in bar has been pleaded, and decided upon by demurrer in favour of the plaintiff. See Tidd's Prac. 693, 694, 8th edition. For if a plea *puis darrein continuance* be pleaded in abatement, after a former plea in bar, the judgment must be peremptory, whether given upon demurrer or on trial; because, after pleading in bar, the defendant has answered in chief, and therefore can never have judgment to answer over. See *Beaton v. Forrest*, Aleyn, 65, 66; *Abbot v. Rugesley*, Frem. 252; Gilb. C. P. 105; 2 Tidd's Pr. 902, 8th edition; 1 Chitty's Pl. 571; Bul. N. P. 310. In *Stoner v. Gibson*, Hob. 81, b, it is said, it was agreed, that if the defendant pleaded in bar to the plaintiff's action a plea which was good, and the plaintiff demurred to it, and the defendant pending the demurrer, pleaded another matter, *puis darrein continuance*, which is decided against him, either on

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demurrer or on trial, still he would be entitled to the benefit of his first plea, because it being a good bar to the plaintiff's action, and standing confessed by him upon the record, he cannot have a judgment in his favour against his own confession. This, if correct, would seem to form an exception to the general rule laid down in the book above cited. But whether a plea *puis darrein continuance* can be received at all after a demurrer has been doubted in *Staple v. Heydon*, 6 Mod. 7, by Powell, Justice; in *Martin v. Wyvill*, 1 Stran. 493, per Eyre, Justice, who cited Moore, 871, and in *Sparks v. Crofts*, 1 Lord Raym. 266, per Holt, Chief Justice, although he said, *Stoner v. Gibson*, Hob. 81, was so. But according to the report of this case in Moore, 871, pl. 1210, which is directly contrary to Hobart, it was resolved that a plea *puis darrein continuance* could not be pleaded after demurrer. See 1 Chitty's Pl. 572, 573.

That the plea of *nil debet* upon demurrer in this case was bad, can admit of no doubt. If the bond declared on here had only been introduced as inducement to the action, *nil debet* might, or might not have been a good plea. In debt for rent claimed under a lease by indenture it is a good plea, because the indenture is not considered the *gist* of the action. It does not acknowledge a debt like an obligation *the debt accrues by the subsequent enjoyment of the demised premises under [*93] it, and it will be received as evidence to show the relation of landlord and tenant, between the plaintiff and defendant, and the amount of rent, and when payable, Gilb. C. P. 62, 63. But this action is grounded upon the bond itself, and therefore *nil debet* was not a good plea. See *Jones v. Pope*, 1 Saund. 38, and the case cited in note 3.

The plaintiffs below alleged as cause for their demurrer to the next plea, that the matters therein contained, were such as might have been given in evidence under the general issue, which had been previously pleaded.

I am inclined to believe that the attorney of the plaintiffs was mistaken in this when he assigned it as cause for demurrer; because, it was not sufficient in law to avoid the bond, and therefore could not have been given in evidence on the general issue; but had it been sufficient for that purpose, then I think, without a doubt, it would have been admissible on the general issue; but still I think, notwithstanding that, the plea would also have been good, and the defendant below upon the demurrer of the plaintiffs to it would have been entitled to a peremptory judgment, that would have discharged him at once from all further claim of the plaintiffs, upon the writing here declared on. The substance of the plea is, that the defendant below, with Jacob Bauer and George Keim, agreed to join in the execution

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of a bond to Peter Roth alone, one of the plaintiffs below, to indemnify him, &c., and positively refused to be bound to John Roth, the other plaintiff, in any manner or form whatever to indemnify him, &c., either severally, or jointly and severally with Peter Roth, and that neither of them being able to read the writing, nor to understand the English language in which it was drawn up, they all signed it upon trust, and delivered it to Peter Roth, without having heard it read, or explained, or interpreted, or having requested it to be so in any way, believing that it was written in exact conformity to their previous agreement. The plea does not state how or why the deviation from their agreement, in writing the bond came to be made, whether by fraud of the plaintiffs below, or mistake of the scrivener, nor attempt to account for it in any way. Now if these circumstances thus set forth, had been sufficient in law, to have prevented the instrument from becoming their deed, notwithstanding they had signed, sealed, and delivered it, without requesting it to be read, interpreted, or explained in any way, the plea would have been good according to the established rules of pleading, because it would then have disclosed matters unnecessary for the plaintiffs to have proved on the plea of *non est factum*, in order to have established the writing to be the deed of the defendant below, but yet sufficient to have shown that it never was his deed. He in his plea confessed the signing, sealing, and delivery of the instrument, in conjunction with Jacob Bauer and George Keim, which is all that the plaintiffs below [*94] have charged in their declaration, and is likewise *all that was necessary for the plaintiffs in the first instance to have proved on the general issue: and besides this, for the purpose of avoiding the bond he has also set forth the other matters, which were not immediately and necessarily connected with the sealing and delivery of a deed, and of course such as the plaintiffs on the general issue could not have been required to give evidence of; and had they only been sufficient in law, to have avoided the bond, it would have been clearly competent for the defendant to have pleaded them specially as he has done. See 1 Chitty's Pl. 442, 443. It would have fallen within the principle of the case of a deed delivered as an escrow, to be delivered to the party in whose favour it is made upon the performance of a certain condition; he however gets it into his possession without the performance of the condition, and without the consent of the party who executed the deed, all which may be either pleaded specially or given in evidence on the general issue, 1 Chitty's Pl. 424, 425; or where the obligor is a monk or a *feme covert*, it may be given in evidence under the general issue or a special *non est factum*, Com. Dig. title Pleader, 2 W. 18.

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In these latter cases it has been so settled on the ground of an entire want of capacity on the part of a monk or a *feme covert* to execute a deed: but still as the party did actually seal and deliver the writing, that may be admitted, and the incapacity set forth to show that it is still not his or her deed in law. So I apprehend that as it is equally necessary that the assent of the mind of the party, as that sufficient capacity in contemplation of law, should attend the sealing and delivering of the writing in order to make it his deed, there can be no good reason why the same form of pleading may not be adopted.

In this state the defendant is at liberty to plead as many pleas in the same action as he pleases, just as the plaintiff may insert counts in his declaration; and I am not aware that the circumstances of two counts in the same declaration, or that of two pleas in the same action, being substantially the same, will render either bad on demurrer.

But I consider the plea of special *non est factum* in this case insufficient, upon the authority of the second resolution in Thoroughgood's Case, 2 Co. 9, b, where it was resolved, that if an illiterate man seals and delivers a deed without requiring it to be read or the contents of it to be made known to him, although it be penned contrary to his meaning, yet it is good and unavoidable. The same doctrine is laid down in 1 Wood's Conv. 374, Powell's ed. title Execution of Deeds, sec. 12, A. It was settled in Manser's Case, 2 Co. 3, that the reading of the writing to an illiterate man, who is about to execute it as his deed, or the interpretation of it to one unacquainted with the language in which it is indited, is not necessary to make it a valid deed, unless he require it to be read or expounded. It is also laid down to the same effect by the author of the Touchstone, vol. 1, 54. From the terms of the plea it is plainly inferable that no such request was made; and it contains no averment that *the writing was misread or the contents of it misstated in any way whatever, which being according [*95] to the resolution in Thoroughgood's Case, the very essence and gist of such a plea, ought therefore to have been introduced, if it were so, according to every rule of pleading as well as of reason. If however the fact would not have warranted such an averment, as I presume it would not, otherwise it would have appeared in the plea, then this form of plea ought not to have been resorted to. I however have no doubt but a party executing a deed under such circumstances, where it is made clearly to appear that the contents and effect of it are materially different from what it was actually agreed they should be, whether the deviation arose from design and fraud, or from mistake on the part of the scrivener, would, if innocent himself, be entitled

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to relief in equity. See *Clarkson v. Hanway*, 2 P. Wms. 205, where the circumstances, that instructions were given in the absence of the grantor by the grantee, and none at any time given by the grantor, who was an old man of weak mind, to the drawer of the deed for preparing it, and that it did not appear to have been read to him at the time of his executing it, and the consideration mentioned in the deed appearing to be inadequate to the value of the estate granted, were held to be badges of fraud, and ground for relief.

In this state we have no court of equity, and therefore it has been considered that whatever would be deemed sufficient ground for relief against a bond in such court, may here be made the ground of defence in a court of law, and given in evidence under the plea of payment with leave to give the special matter in evidence; or if the bond be conditioned for the performance of certain covenants, or collateral matters, the defendant having prayed and obtained oyer of the condition, and pleaded performance thereof, with leave to give the special matter in evidence, may under the same, give all such matter for relief in evidence; or in either case may plead it specially, *Swift v. Hawkins*, 1 Dall. 17; *Baring v. Shippen*, 2 Binn. 154; *Latapee v. Pecholier*, 2 Wash. C. C. R. 180; *M'Sherry v. Askew et al.*, 1 Yeates, 79; *Bender v. Fromberger*, 4 Dall. 439; *Webster v. Warren*, 2 Wash. C. C. R. 456; *Roth v. Miller*, 15 Serg. & Rawle, 105. And taking into view the course of proceeding peculiar to us, I must confess, that my mind at times has not been altogether free from doubt; but upon full deliberation, I incline to think that the plea, in order to constitute a perfectly good defence against the bond in equity, ought to have been explicit, and that it is defective in not stating the transaction more fully, and giving to it some definite character, by showing particularly how the deviation for the previous agreement in drawing the bond came to be made; whether by fraud or mistake, and that it was done without the knowledge or assent of the defendant, for without all this, in case of a demurrer to his plea, I do not see how he could claim to have a judgment in his favour unless he has stated in his plea all the circumstances with *such precision that the court may see

[*96] whether it has arisen from fraud or mistake, and decide, distinctly, upon which it is that he is entitled to relief. I am the better satisfied with this conclusion, as the defendant has already been permitted on the trial of the issues in fact in this case, to give in evidence to the jury, under the direction of the court, all the special matters and circumstances connected with the giving and obtaining of the bond, upon which he founds his claim to relief, and after a full hearing they have decided

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against him. The difficulty in this respect which has been presented here induces me to believe, that gentlemen of the bar ought to be very cautious in demurring to pleas which set forth special matters and circumstances from which fraud or mistake may be inferred to have been practiced, or to have taken place in the obtaining of the writings upon which the suits are brought. Unless the plaintiffs are willing to admit the truth of all such special matters and circumstances, a demurrer ought never to be thought of, otherwise it appears to me, to be a perilous course, and one that may defeat a very just cause of action.

The next error assigned is in the judgment of the court below upon the demurrer to the plea, that one of the plaintiffs had made an assignment of all his property to a trustee for the benefit of his creditors, and obtained a discharge under the insolvent laws of this state. The insufficiency of this plea to prevent the further maintenance of the action by the plaintiffs below, is too plain even to admit of doubt or argument. The 4th section of the insolvent law of the 20th of March, 1814, declares that "no suit brought by such debtor and pending at the time of the appointment of said trustee or trustees shall abate thereby, but the same shall be continued and the money or property recovered therein shall be paid or given to the said trustee or trustees." The law does not require that the names of the trustees shall be substituted for that of the plaintiff in such cases, nor that they shall appear in any form upon the record. Neither has it been the practice to substitute them on the record for the plaintiff. The argument urged in support of the plea is, that the trustee appointed never having given the security required by the law, there was therefore no person in being, who was authorized to carry on the suit and to receive the money when recovered. If this had been the only difficulty which the defendant below conceived that he had to encounter at the time he put in this plea, it appears to me, that the court below could have granted to him all the relief that he could have wished for in this respect, upon his paying the money demanded into court, with the costs incurred up to that time; the court would then have made an order staying all further proceedings in the suit: but upon no principle whatever could the discharge of the plaintiff under the insolvent laws, furnish a pretence for a plea against the further maintenance of the action. If Peter Roth, the insolvent, had been the only plaintiff in this suit and the defendant had satisfied the court below that he had a good *defence against the plaintiff's claim [*97] on the merits, and that he would have to encounter considerable expense in order to establish it, the court possibly in its discretion might have staid the further proceedings in the

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action, until some one having authority to manage and direct the suit on the part of the plaintiff should appear. But in this case John Roth, the other plaintiff, who appears to have been the plaintiff really damnified, was perfectly competent to direct and carry on the action and to have received and given a good acquittance for the money when recovered and paid; so that there was not the slightest reason for claiming protection from the summary and equitable powers of the court. The cause specially assigned for the demurrer to this plea, is, that the matter therein set forth, if it could have availed, ought to have been shown to have occurred since the last continuance of the cause, instead of which it appears, on the face of the plea itself, to have taken place long before. If this plea were otherwise good, this is not an objection which goes either to the form or the merits of it. It is a mere irregularity in point of time in putting in the plea, and no cause for demurrer, whatever it might have been for setting it aside if the court below had been moved for that purpose; which power perhaps may be fairly questioned since the act of the 21st of March, 1806. See *Anonymous*, 2 Vent. 58; *Wilson v. Wymonsold*, Sayre, 268; and *Morgan v. Dyer*, 10 Johns. 161.

I can scarcely avoid thinking that the defendant below and his counsel had very little confidence in the merits of the previous pleas, or otherwise they never would have put their defence in jeopardy by resorting to this last plea; for considering it in the light of a plea *puis darrein continuance*, it would in England at all times have been deemed a waiver of all prior pleas. The rule is well settled there, that after a plea in bar, if the defendant plead a plea *puis darrein continuance*, it is a waiver of his bar, and no advantage shall afterwards be taken of it. Nor shall he be permitted to recur to and to proceed on the former plea. *Barber v. Palmer*, 1 Salk. 178; s. c., 1 Ld. Raym. 693; 12 Mod. 539; 1 Chitty's Pl. 571; 2 Tidd's Pr. 902. The law probably may be different here, where the defendant is at liberty to plead as many pleas as he pleases, and to hold fast by all. On this, however, I do not wish to be understood as giving any decisive opinion, but have suggested it as a caution against frivolous pleas *puis darrein continuance*.

The fifth error complained of does not seem to have been presented by the evidence in the cause, but if the point had been raised by the evidence, the court was right in its answer.

There is not the least ground for complaint in the sixth error assigned. In the assignment of this error a very material part of what the court below told the jury in relation to the point of which the court was then speaking, is omitted, to wit, "the measure of damages is the amount of the injury actually sus-

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tained." Taking then this clause in connection with that which is made the ground *of exception in this error, the principle laid down by the court to the jury, in regard to [*98] estimating the amount of the damages in case they should find for the plaintiffs below, was as favourable for the defendant as he could ask.

Neither do I think that the plaintiff in error, has any cause for complaint in respect to that part of the charge of the court to the jury, which is made the basis of the seventh and last error; because the court at the same time that they gave the direction complained of, recommend to the jury, in case they should find for the plaintiffs below, to regulate the amount of the damages by the amount of the moneys actually paid out by the plaintiffs with interest thereon from the times of their payment, which was adopted by the jury, and was certainly the most favourable rule for the plaintiff in error, that could have been laid down.

I, however, am far from being convinced that the court below would have been in error if they had gone to the full extent of all that is complained of, and told the jury, unqualifiedly, that they ought to assess the damages by the amount of the several sums of money, with the interest thereon, which had become payable anterior to the commencement of this action upon the obligations referred to in the condition of the bond of the defendant below, for which the plaintiffs there were bound as the sureties of David Musselman, so far as the same remained still unpaid by David Musselman or the plaintiff in error; for the condition of the bond in this action, is not merely that the plaintiff in error, and his co-obligors, should indemnify and keep harmless the defendants in error, but likewise that the said David Musselman should pay, or cause to be paid, the aggregate of the obligations therein mentioned, in which the plaintiffs below were his sureties, on the days and times appointed by the same for that purpose. Now if Musselman failed to pay these sums of money, or any of them, on the appointed days and times, there was a breach of the condition of the bond in suit the instant that he so failed and the plaintiff in error became liable to be sued upon it; and as often as he failed to pay after his first delinquency, there was a new breach of the condition on the part of the plaintiff in error, of his bond. Breaches to this effect of the condition of this bond, have been assigned by defendants in error, in their declaration. To these breaches certainly the plea of *non damnificatus* would have been no answer; for if it had been put in and demurred to, the defendants in error would have been entitled to judgment. Such too would seem to have been the opinion entertained at first by the attorney of the

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defendant below; for instead of this plea, a performance of the condition was put in which met these breaches directly. Sergeant Williams, in his note (1) to the case of *Cutler v. Southern*, 1 Saund. 116, who has referred to a number of authorities on the subject, lays down the following distinction, that "this plea, that is, *non damnificatus* cannot be pleaded where the condition is to discharge or acquit the plaintiff from such a bond or other particular thing, for there the defendant must *set forth [*99] affirmatively the special manner of performance. But it is otherwise where the condition is to discharge and acquit the plaintiff from any damage by reason of such bond or other particular thing, for that is in truth the same with a condition to indemnify and save harmless." In the case before us, one part of the condition was that Musselman should pay the several sums of money for which the defendants in error were bound as his sureties at the time specified for that purpose, and thereby in effect discharge and acquit them from their obligations; with which nothing but a punctual payment of the moneys or otherwise a formal acquittance, obtained for the defendants in error from their obligations on account of Musselman, could be considered even a substantial compliance. I think it also very evident that the great object of giving the bond in question, from the terms in which the condition is drawn up, was, to prevent the defendants in error from paying the money out of their own property, and especially to prevent its being taken in execution for that purpose, by putting it in their power to proceed by suit upon the bond from time to time to collect the money of the plaintiff in error and his co-obligers, as Musselman became delinquent.

In the case of *Holmes et al. v. Rhodes*, 1 Bos. and Pul. 638, it was held, that *non damnificatus* could not be pleaded to debt on a bond conditioned for the payment of a certain sum of money at a certain day to a certain R. W., for the payment of which the plaintiffs were bound in an obligation with the defendant as his sureties, and thereby acquit, release, and discharge the said plaintiffs, &c.; showing distinctly on its face that it was a bond of indemnity. The court said, "that the plea of *non damnificatus* was no answer to that part of the condition by which the defendant undertook to pay the sum for which the plaintiffs bound themselves, and was therefore bad." The only shade of difference between this case and the one under consideration, is that in the latter the condition of the bond is, that Musselman, who was not bound in it, should pay certain sums of money at certain days to certain persons to whom the obligees were bound with him in obligations as his sureties for the payment; and in the former, the condition was that the obligors should pay.

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Whether the condition be that the obligor or another shall do the particular act required to be done at a specified time, does not change or vary the character or nature of the condition; in either case, if the act be not done by the time appointed, the bond will become forfeited and the obligee entitled to sue upon it. And it appears to me that the Supreme Court of the state of New York, have gone still further in the case of Chace, administrator of Stranahan, v. Hinman, where it was held that an indemnity against any liability for damages or expenses would entitle the party to sue on his indemnity, and to recover to the full extent of his liability, without his having paid or discharged it. 8 Wend. 452. These observations on this last point, are not given as the opinion of the court, for the jury having adopted a different principle, under the recommendation of the court *below in ascertaining the amount of the [*100] damages, rendered it unnecessary for the court to express one upon it. The judgment of the court below is affirmed.

Judgment affirmed.

Cited by Counsel, 3 Wh. 99; 5 Wh. 560; 2 Wh. 78; 5 W. & S. 34; 7 W. & S. 101; 4 Barr, 225; 7 Barr, 406; 2 J. 341; 10 H. 284; 12 H. 485; 6 Wr. 326; 13 S. 344; 2 N. 375, s. c. 4 W. N. C. 67.

Probably overruled by 1 Phila. 178.

[PHILADELPHIA, FEBRUARY 4, 1833.]

Coates against Roberts.

IN ERROR.

Of interpleading generally, and particularly, as it is practiced in Pennsylvania.

The recovery of a debt, in *scire facias* against the garnishee, upon a judgment in a foreign attachment, is a bar to a recovery of the same debt from the garnishee by a person who took defence on the trial of the *scire facias*; provided such recovery was not the result of misrepresentation, fraud, or neglect on the part of the garnishee, or of collusion between him and the plaintiff in the attachment.

If counsel submit to the court several distinct questions of law, with a request that the jury may be instructed on them, it is not error to answer them collectively, provided they all relate to the same matter and are answered fairly and fully.

WRIT of error to the Court of Common Pleas of Chester county, in an action of *assumpsit* in which the plaintiff in error, Moses Coates, was plaintiff, and the defendant in error, Robert Roberts, defendant, upon the acceptance of an order in the nature of an inland bill of exchange.

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The declaration contained four counts.

The first, which was not relied on, was on the acceptance of an order dated 5th month 6th, 1820, drawn by Isaac Coates in favour of Moses Coates, for three hundred and fifty-six dollars and thirty-two cents.

The second count was for money had and received.

The third was on the said order as an inland bill of exchange.

The fourth was a special count, setting forth the material facts of the case, as follows :

"And whereas, also heretofore, to wit, in the year 1817, the defendant became the purchaser of certain real estate of one Moses Coates, deceased, father of a certain Isaac Coates, by which a certain part of the purchase-money was to remain in the hands of said defendant, the interest thereof to be paid annually to the widow of the said Moses Coates, deceased, during her natural life, and at her decease, the same to be divided amongst the children of the said Moses Coates, of which a certain part to wit, the sum of three hundred and fifty-six dollars and thirty-two cents, was payable to the said Isaac Coates, one of said children, at the death of said widow. And whereas, afterwards, to [*101] wit, on the 6th of May, 1820, the defendant *being still the owner and possessor of the same real estate, and the said Isaac Coates being indebted to the plaintiff in a large sum of money, in payment thereof gave the said plaintiff his certain order in the nature of an inland bill of exchange upon the said defendant, as follows, to wit :

"Friend Robert Roberts—Please to pay Moses Coates, at the death of my mother, three hundred and fifty-six dollars and thirty-two cents, it being my share of her thirds that is left in thy hands.

"5th month, 6th, 1820.

ISAAC COATES.

"Which said order afterwards, and after the death of said widow, the mother of the said Isaac Coates, to wit, on the 30th of October, 1824, was presented to the defendant for acceptance, and the said defendant was then and there informed that the same order had been given in payment of a debt due from the said Isaac Coates to the plaintiff, whereupon, the said defendant accepted the same, and then and there undertook and faithfully promised to pay the said sum of three hundred and fifty-six dollars and thirty-two cents, to him the said Moses Coates, when he should become satisfied, or lawfully informed of the death of the said widow ; and the plaintiff in fact says, that the said defendant afterwards, to wit, on the day and year last aforesaid, at the county aforesaid, was satisfied or lawfully informed of the

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death of the said widow, by means whereof the defendant became liable," &c.

The defendant pleaded *non assumpsit*, and payment with leave, &c., and also a special plea, setting forth in substance, that a certain Rebecca Jones, at January Term, 1824, of the Court of Common Pleas of Chester County, issued a writ of foreign attachment in debt for eight hundred dollars against the said Isaac Coates, and summoned the defendant, Robert Roberts as garnishee: That on the 1st August, 1825, the plaintiff in the attachment obtained judgment: That on the 17th January, 1828, she issued a *scire facias* upon the judgment against Roberts the garnishee, returnable to January Term of that year, and on the 8th November, 1829, recovered judgment against the garnishee for the sum of three hundred and fifty-six dollars and thirty-two cents, with costs: That upon the trial of the issues in the *scire facias*, Moses Coates, the present plaintiff, appeared in court and took defence; and the plea avers that the moneys now demanded in the declaration of the plaintiff in this cause, are the same moneys which were recovered from him by Rebecca Jones.

To this plea the plaintiff replied, that the proceeding by foreign attachment pleaded by the defendant was commenced at the instance of the defendant, Roberts, after he had undertaken and become liable to pay to the plaintiff, Coates, the money in the declaration mentioned, and by collusion between him, Roberts, and the plaintiff in the foreign attachment, and that the judgment therein obtained, was obtained by the collusion, misrepresentation, and neglect of him the said Roberts; and the plaintiff denied that he appeared in court and took defence as set forth in the plea.

*The defendant rejoined "no collusion, misrepresentation, and neglect of him the said Robert Roberts," and issue. [*102]

The material facts proved on the trial in the court below, as they appeared from the paper-book furnished to the reporter, were these: In the year 1817, the defendant, Roberts, purchased certain real estate subject to the payment of a sum of money, at the death of the widow of Moses Coates, deceased, to certain of his heirs, of which the sum of three hundred and fifty-six dollars and thirty-two cents was payable to Isaac Coates, the brother of the plaintiff. In the year 1820, Isaac Coates, being indebted to the plaintiff, and also wishing to raise funds to enable him to remove to the western country, gave the order declared upon, upon which a further sum was advanced to him by the plaintiff. In the year 1824, intelligence of the death of the widow Coates (who had also removed to the western country) was received, when Moses Coates, the plaintiff, called upon

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Roberts, the defendant, with the order, and stated to him the circumstances under which it had been given. After having read it, Roberts said, in the presence of a witness, "as soon as I become satisfied of the widow's death I will pay it." The letter containing the information of her death was then shown to him, and he said he was satisfied and would pay the money. Besides this proof of the acceptance of the order, the same fact was established by two affidavits of Roberts himself; one made on an application to open the judgment by default which has been suffered in the *seire facias* upon the judgment in the foreign attachment pleaded, and the other in answer to interrogatories in another foreign attachment.

Shortly after the interview at which the letter announcing the death of the widow Coates was exhibited to the defendant, he called on a neighbour, George Fisler, and suggested to him that he might go to Rebecca Jones and get her to attach the money in his hands, as by doing so, she might secure her debt against Isaac Coates, stating at the same time, that Moses Coates had called on him with an order from Isaac, which he had refused to accept. Fisler, (as he testified on his examination,) went to Rebecca Jones at the instance of Roberts, got the bond from Isaac Coates to her, took it to an attorney and had a writ of foreign attachment issued. When the sheriff came to attach the money in Roberts' hands, he asked him, in Fisler's presence, how much money of Isaac Coates he had in his hands; to which Roberts replied, "about four hundred dollars."

Judgment was taken in the foreign attachment, and a *seire facias* issued against Roberts, the garnishee, in which judgment went by default. A year afterwards Roberts applied to the court to open this judgment, founding his application on an affidavit, that he had accepted Isaac Coates' order in favour of Moses Coates, and become liable to pay him the money, and that he had spoken to Mr. Duer, (an attorney,) to appear for him, who had neglected to do so. The plaintiff's counsel consenting that the application should be considered as having [*103] been made at the next term after the judgment was entered, the court opened it.

Moses Coates did all he could to aid Roberts in the defence, not being aware of any bad faith on his part. But on the trial of the *seire facias*, Fisler proved, that Roberts procured the attachment to be issued; that he had told him he had not accepted the order; and that he had also told the sheriff, in his Fisler's presence, that he had about four hundred dollars in his hands, of Isaac Coates' money, when the attachment was served.

This evidence of the declarations of Roberts was admitted after an objection taken, which the court overruled.

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On the trial of this cause in the court below, the plaintiff, in support of his replication, proved by Fisler, that at the trial of the *scire facias* on the judgment in the foreign attachment, no other witness than himself was examined on behalf of Rebecca Jones: That he made the same statement to that jury that he made on the trial of this cause: That he informed them that Roberts had told him he had not accepted the order: That he had informed them that it was at Roberts' instance that he had procured the attachment to be sued out, and that he should not have gone to Rebecca Jones, and had the attachment issued, if it had not been for Roberts.

Judge Darlington was also examined to prove what occurred on the trial of the *scire facias*, and fully corroborated the evidence of Fisler.

The court was requested by the plaintiff's counsel to instruct the jury on the following points:

"1. By the evidence in this cause, Roberts made himself liable to pay the order to Moses Coates, before the attachment issued.

"2. Coates has done nothing, whereby his right to hold Roberts responsible, is waived or lost.

"3. If the jury believe that procuring the attachment to be issued under the circumstances proved, was an act of bad faith, in violation of the contract with Coates, the proceedings under it ought not to screen the defendant from responsibility.

"4. If this jury believe that the conduct and language of Roberts furnished evidence in the foreign attachment, which was calculated to mislead the jury as to his liability to pay the money to Moses Coates, the judgment in that suit ought not to protect him.

"5. If the jury in that case believed the testimony of George Fisler, they could but find against the defendant, and the defendant's own affidavits, now produced, show that what he represented to Fisler was incorrect.

"6. If Roberts and his counsel neglected, in the foreign attachment to prove all the facts necessary to show the true state of the transaction with Moses Coates, we are entitled to recover, notwithstanding the judgment in that attachment."

*On these points the following charge was given, [*104] which was reduced to writing and filed by request of the plaintiff's counsel.

"1. By the evidence in this cause it is shown that Robert Roberts was liable to pay to Isaac Coates the sum of three hundred and fifty-six dollars and thirty-two cents upon the death of his mother, which took place in October, 1824, and that Isaac Coates, by his writing of 6th May, 1820, requested him to pay

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it to his brother, Moses Coates. According to the testimony of Dr. Jesse Coates, this order was presented to the defendant about the end of October, 1824, who then said he was satisfied, and would pay the money; this was a sufficient acceptance of the order, or inland bill of exchange, and if nothing else appeared in the cause, would make Mr. Roberts liable to pay the amount of it to Moses Coates before the attachment issued; without at all entering into the question which subsequently arose with other creditors, whether the real ownership of the three hundred and fifty-six dollars and thirty-two cents was in Moses Coates or Isaac Coates.

"2. The court cannot say to the jury that 'Moses Coates has done nothing whereby his right to hold Roberts responsible is waived or lost,' without assuming a disregard of much of the evidence in the cause. It is in evidence, that on the *scire facias* issued by Rebecca Jones against Robert Roberts, garnishee of Isaac Coates, Moses Coates, the present plaintiff, having been very early apprised of the attachment, and the claim upon the money still as the property of Isaac Coates and not of him, Moses Coates; and the defendant, Robert Roberts, in that *scire facias*, having pleaded that he had no money or goods in his hands belonging to Isaac Coates, and Moses Coates, the present plaintiff, claiming then, as he does now, that the money in the hands of Robert Roberts belonged to him and not to Isaac Coates, participated in the defence then made. According to the evidence he procured the attendance of witnesses, was present with the counsel during the trial, produced the very order now before you, and according to his assertion to Mr. Fisler a short time ago, he carried on that suit in concert with Mr. Roberts: Now, when this *scire facias* was issued against the garnishee, and the question distinctly put in issue by the pleadings, whether the money in the garnishee's hands was really the property of Isaac Coates, or of another person (Moses Coates, the plaintiff), and of course whether it was liable to the plaintiff's attachment, if from the evidence, this jury should be of opinion, that Moses Coates, the plaintiff, had notice, an opportunity to take defence, and actually did take defence, it now no longer stands as a mere *ex parte* proceeding; the decision in that case that the money in the hands of Roberts, the defendant, was the property of Isaac Coates, and liable to the attachment against him, was in effect a decision that it did not belong to Moses Coates, notwithstanding his order and alleged acceptance, [*105] and Moses Coates is bound *by that decision:—taking it for granted there was no fraud or collusion on the part of Roberts.

"3. Whether Roberts, properly or improperly procured the

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attachment of Rebecca Jones to be issued, or whether it was an act of bad faith or not, in violation of his alleged contract with Moses Coates, the whole evidence on the subject, such as it was, was in the power of, and spread before the plaintiff on the trial of the *scire facias*, in which there is evidence of his participating and taking defence, and by which decision, as has been before remarked, he must be bound, unless there has been shown collusion, misrepresentation, or neglect, on the part of the defendant, in conducting that suit to judgment.

“4th, 5th, and 6th. If the conduct and language of Robert Roberts furnished evidence in the foreign attachment, calculated to mislead the jury as to his liability to pay the money to Moses Coates: If they believed the testimony of Fisler and Roberts had misrepresented the matter to him, and if Mr. Roberts neglected to prove all the facts necessary to show the true state of the transaction with Moses Coates, without giving the present plaintiff an opportunity to make and prosecute his claim, or in the language of the replication, by collusion, misrepresentation, and neglect, suffered a verdict and judgment to pass against him, to the prejudice of the plaintiff's rights, the judgment ought not, and will not protect him, and the plaintiff here will be entitled to recover, notwithstanding such collusive judgment. But if the jury shall be of opinion, that Moses Coates, the person then as well now interested in showing that the money in question, in the hands of Roberts, was really his and not Isaac Coates', had due notice of the claim, an opportunity to come forward, assist in the defence and maintain his right to the money, to employ counsel or engage counsel in concert with Mr. Roberts, to produce his witnesses and maintain his claim upon the money, he is not to throw the whole blame of defeat on Mr. Roberts, the stake-holder:—it would be a fair contest between parties for a particular sum of money, in which the plaintiff was defeated; a regular judgment has passed against his claim; the money has been paid accordingly, and it would be against law and equity, to demand of the defendant to pay it over again.”

The charge was excepted to by the counsel for the plaintiff, who, in this court, assigned the following errors:

1. That the court erred in their charge to the jury upon the several points submitted by the plaintiff's counsel, as reduced to writing and filed, pursuant to the act of assembly.
2. The charge ought to have been in favour of the plaintiff.

The cause was argued by *Dillingham* and *J. Sergeant*, for the plaintiff in error, who cited *Chitty* on Bills, 1; *Stock v. Mawson*, 1 Bos. & Pull. 291; *Walwyn v. St. Quintin*, Ib. 654; *Chitty* on Bills, 12 (note,) 42, 48, 49, 50, 65, 66, 67, 68, 69, 171, 172,

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[*106] 176, 177, 180, *186, 188, 189, 191, 194; *Cooke v. Colehan*, 2 Str. 1217; s. c. *Willes*, 396; 1 Stark. on Ev. 184, 185, 187, 188, 191, 192, 241, 254; 1 Phill. Ev. 223, 226, 243, 245; 2 Harr. Ch. Pr. 367; Co. Litt. 271, a; 2 Prest. on Conv. 327, 345; *Fermor's Case*, 3 Co. Rep. 77; *Borden v. Fitch*, 15 Johns. Rep. 145; *Hull v. Blake*, 13 Mass. R. 153, 157; *Sergt. on Att.* 184, 185; *Moore et al. v. Spackman*, 12 Serg. & Rawle, 287; *Rapelje v. Emery*, 2 Dall. 232; 1 Eng. Com. Law. Rep. 188

Tilghman, for the defendant in error, cited *Heller et al. v. Jones*, 4 Binn. 61; *Davis v. Harvard*, 15 Serg. & Rawle, 165.

The opinion of the court was delivered by

HUSTON, J.—This suit was *assumpsit*, and the declaration contained four counts. The first was on an order drawn by Isaac Coates in favour of Moses Coates, and dated 5th month 6th, 1820, for three hundred and fifty-six dollars and thirty-two cents. The second was for money had and received. The third on the acceptance of the said order, as an inland bill of exchange; and the fourth was a special count setting forth all the facts. The pleas were *non assumpsit* and payment, with leave, &c. After the last two counts had been added to the declaration, the defendant pleaded a foreign attachment by Rebecca Jones against Isaac Coates, with notice to Roberts, as garnishee; *seire facias* against the garnishee, and judgment thereon, with an averment that Moses Coates took defence in that attachment, &c., &c. The plaintiff replied that the attachment was issued at the instance of Roberts, and the judgment occasioned by the collusion, misrepresentation, and neglect of the said Roberts, and denied that he took defence, &c. The defendant rejoined that there was no collusion, misrepresentation, or neglect. On this issue the parties went to trial. There was not in the court below, nor here, any objection to the pleadings. In fact, the special plea of the attachment and judgment on it was, perhaps, not formal, but it was not necessary, as it seems to be well settled, that whatever strictness was once necessary, and perhaps is in some forms of action against the garnishee, yet when *assumpsit* is brought against him by the defendant in the attachment, or any claiming under him, the garnishee may plead *non assumpsit*, and give the attachment in evidence. 1 Saund. 67, *Turbill's Case*, in notes; and here, in debt on bond, the defendant may plead payment, with leave, &c., and give the attachment in evidence. In England, the attachment being by the custom of London, and in an inferior court, great strictness was once required in setting out the custom correctly, and all the proceedings, even to the payment

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of the money, but here the attachment is given by act of assembly in the courts of common law, and no special circumstances are necessary to give jurisdiction.

In order to understand the points, here made in this case, it will be necessary to advert to the facts. I have carefully extracted them from the record. Dr. Jesse Coates proved, that on the 30th of *October, 1824, he went with Moses Coates [*107] to the defendant; Moses took out the order and showed it to Roberts, who said he would pay the order and all the rest, when he was satisfied of the death of the widow. (It was understood in the cause by all, that Roberts was to pay to each of the heirs of Moses Coates, deceased, three hundred and fifty-six dollars and thirty-two cents, on the death of the widow.) Moses then showed him, and at his request read, a letter, stating the death of the widow, and the precise time at which it took place. Roberts said he was satisfied, and would pay the money. He said he must go legally about it; he must go and see Mr. Duer, (a lawyer;) that Duer did all his business. He further said, that when Moses presented the order, he told Roberts that Isaac owed him money and gave him that order in payment of his debt. The witness, after other matters, perhaps not material, proved, on a cross-examination, that he was subpœnaed, and attended at the trial of the *scire facias*, on the attachment, at the instance of Moses Coates; that Moses sat by Duer, the counsel, at that trial, and that the witness then proved what is stated above. The witness then, at the instance of the plaintiff, proved the handwriting of Isaac Coates, to the order, and that Isaac told him he got the money of Moses to go to the western country, and had given this order in payment of it.

Roberts had been examined on interrogatories in the foreign attachment, and the plaintiff's counsel then read his answers, the material part of which was, that he had three hundred and fifty-six dollars and thirty-two cents, in his hands, to be paid at the death of the widow: that Moses had presented the order, and he had agreed to pay it when satisfied of the death of the widow: that Moses had shown him a letter which satisfied him, and that this was before the attachment was served on him.

The plaintiff's counsel further produced the record in the attachment to show the date when it issued, viz., the 3d of December, 1824.

The defendant's counsel then read the whole of the record in the attachment suit, in which there was a verdict for the plaintiff on the issue against the garnishee, (the demand of the plaintiff in the attachment, was eight hundred dollars.) The verdict further found that there was in the hands of the garnishee, the sum of three hundred and fifty-six dollars and thirty-two cents.

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A motion for a new trial was made and argued, and judgment given for the plaintiff, on which a *feri facias* issued for the debt, &c.

George Fisler was then called by the defendant, who proved that he was the agent of Rebecca Jones in the attachment, and at the trial of the *scire facias*, against the garnishee: that Moses Coates attended the trial: that the parties were contending who should get the three hundred and fifty-six dollars and thirty-two cents, which was due Isaac Coates on his mother's death: that Moses produced this order: that in a conversation lately between Moses and the defendant, each said the [*108] other had employed Duer, (the counsel,) but *Moses admitted he paid him a fee for that business: that Moses said Roberts and he had carried on that suit in concert, which Roberts denied, and said he never paid anything. Mr. Duer is dead.

The defendant then called Mr. Pyle, the counsel for Rebecca Jones, and proved by him, the payment of the money by Roberts, on the *feri facias*, to him as an attorney to Mrs. Jones, and the defendant closed.

The plaintiff then called George Fisler again, who stated that in the fall of 1824, Roberts told him that Moses Coates had presented an order purporting to be written by Isaac for this money: that he had told Moses as soon as he had legal evidence of the widow's death, he would pay the whole and be done with it: that Roberts further told him that one Edwards had attached the money in his hands: that there would be more than would pay Edwards: that as I knew Rebecca Jones, I might tell her, and there would be an opportunity for her to try to get a part of her debt: that the witness told her, and she gave him her bond on Isaac to take to a lawyer: that he was with the sheriff when he served the attachment, and when he asked how much money he had, Roberts replied, between three and four hundred dollars. Roberts had told me (the witness,) that if Rebecca Jones took an attachment, she would have an opportunity to get part, as there was more than would pay Edwards. He said he had not accepted the order to Moses. The witness further said he would not have told Rebecca Jones, and no attachment would have issued, if Roberts had not told him: that he gave the same evidence at the former trial: that he and Dr. Coates were the only witnesses examined at that trial: that he did not remember that Dr. Coates told the jury at the former trial that the order was given by Isaac for a debt to Moses.

Judge Darlington, before whom the issue on the *scire facias* in the attachment was tried, was then called, who from his notes proved, that Dr. Coates, proved as here, the presentation

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of the order to Roberts, and what passed : that Mr. Duer then asked Dr. Coates to state how much money Isaac Coates owed to Moses, which was objected to, and the court decided in these words : " We cannot go into the state of accounts between Isaac and Moses Coates, except so far as it is connected with some actual transfer of this particular debt ;" and no more was said. Mr. Duer then read the order : that Dr. Coates was asked at whose instance he attended that trial, and he replied at the instance of Moses Coates : that the counsel of Rebecca Jones, then called George Fisler, and asked him to relate the conversation he had with Roberts : that this was objected to, but admitted, he being a party to the cause, and his declarations good evidence against him.

The judge then read from his notes the testimony of Fisler, in that former trial, agreeing with what he stated as above.

The judge further proved that it was admitted the money was in the hands of Roberts ; and Mr. Duer, the counsel, stated to the jury, that *the only question was, whether at the time of the attachment laid, the money belonged to Isaac [*109] Coates, or Moses Coates.

The foregoing was all the evidence given in this cause. The counsel then stated certain propositions, on which he requested the court to charge the jury, for which I refer to those propositions, and the charge of the judge. The errors assigned were in the answers to the propositions, but in fact the argument here turned principally on other matters.

And first, it is alleged, there was error in the admission of Fisler to prove in the trial on the *scire facias*, in the attachment, what Roberts had said to him ; and next the whole practice of interpleading is objected to, at least, as practiced in this state.

I shall notice this first. There certainly was a time in England, when the practice in the courts of law was very different from what it is now in that country, and more different from what it always was, and is here. That practice gave constant employment to the courts of chancery ; and even the courts of chancery have extended their powers, or applied them to subjects, not formerly known. When bills of interpleader were first used, I shall not inquire. Lord Hardwicke speaks of them in 1 Vezey, 249, as a new invention, and not to be encouraged ; they have, however, been applied much more extensively, than in his time, and now parties are compelled to interplead by the courts of law, without the trouble, delay, and expense of a bill of chancery.

We are told (See Maddock's Ch. 173), a bill of interpleader lies where a person claiming no right in the subject, and not knowing to whom to render a debt or duty, apprehends injury from

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claims made by two or more claiming in different rights the same debt or duty. A mere claim is now the subject of such bill, and that the one claims in a legal and the other in an equitable right. It is granted on an affidavit that the bill is not exhibited by fraud or collusion, but for his own security, but it need not state that it is done at his own expense, nor that it is filed without the knowledge of either party. The bill must show that there are two persons in existence, each of whom claims the property; if one of them does not appear or will not support his claim, the debt is given to the one who does appear, and a perpetual injunction is granted as to the other. I shall not go into the inquiry as to all the cases to which it applies; it is the appropriate remedy for a mere stakeholder. Sometimes a trial at law is directed, and after the plaintiff in the bill has no more concern in the matter, his death does not stay the proceedings, and the cause will be decided between the claimants, without a bill of revivor, 1 Vernon, 351.

We have no court of chancery, but as it often happens, that more than one person claims an interest in, or right to the same goods or money, and as it would be a disgrace to the administration of justice, that the law should levy a sum of money from a defendant for one person, and the same law should, without any fault of the defendant, compel him to pay the same debt to [*110] another, the practice of permitting *a party to interplead, has long been well known, and in some cases, the courts compelled a person to interplead, or more properly, to appear and take defence in a suit, or to be forever barred. And by an act of assembly, 16th April, 1827, for distributing money raised by sales on execution, the court are required to give notice to all who may claim; and if any person neglects to appear and take defence against any claimant, such person is forever barred; and by the decision of this court, it is not necessary nor proper that each claimant should bring an action; if one sues, and an issue is directed, every claimant must interplead, or be forever barred. 2 Rawle, 37. This act of assembly is only a recognition of what was always the law and the practice, with the addition of prescribing what shall be notice to all concerned, and of giving an appeal to the Supreme Court. So under the 14th section of the act, 20th March, 1810, giving jurisdiction to justices of the peace, it is provided that a judgment may be entered before a justice, by confession, &c., for a sum exceeding one hundred dollars; if, however, any creditors of the defendant shall make oath before the justice, that there is just cause to believe such judgment was confessed with a view to defraud creditors, it is made the duty of the justice to transmit a transcript of his judgment to the prothonotary of the Common Pleas,

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whose adjudication thereon shall be final. Under this act the practice has been in some countries to order a feigned issue; in others the court on proper affidavits opens the judgment, and permits the creditor or creditors to plead, and the plea is entered as being made by some creditors; the verdict and judgment in either form, in the words of the act, are final.

The case of Heller and Jones, 4 Binn. 61, is the earliest recognition I have found in our books of interpleading, and the effect of it. The proceeding began by a judgment confessed in 1787. On a *scire facias* to revive this judgment, Miller, who claimed under a younger judgment, on which he had sold the land, was permitted to enter a plea, and he gave notice of special matter. This was before Rush, then president of that district, and who had been a justice of the Supreme Court, under the former constitution. The cause was removed to the Supreme Court, and tried at Nisi Prius in 1795. No objection was made to his right to interplead, though eminent counsel were concerned; but for some cause, he did not appear at the trial; no witnesses were examined, and a verdict and judgment were rendered for the plaintiff, who levied on and sold the land, and brought ejectment against Heller, who had bought from Miller. Heller offered to prove the same matter which Miller had alleged in his plea to the *scire facias*, and it was held he could not: That Miller, under whom he claimed, having been admitted to interplead, and put in a plea, &c., was barred, although he afterwards neglected the defence, and Heller claiming under him, was also barred. In the argument, the right of Miller to appear and interplead, was denied, and also the effect of it, if he had been heard, and Judge Breckinridge was with them, but the Chief Justice and *Judge Yeates, whose practice began in [*111] 1762, and had been perhaps more extensive than that of any other man, then or since in this state, had no doubt as to this point, and I have never heard the right of a party interested to interplead, denied since. The acts of assembly, above referred to, are predicated on the existence of such practice; they did not introduce it.

The only difference between the practice here and in England, is, that there, when one claimant sues, and interpleading is ordered, the name of the other claimant is substituted as defendant, and the name of the bailee or stakeholder, is struck out; here, so far as I have known the practice, one claimant sues him who has the money or property, and the other claimant is permitted or compelled to defend the suit, and show his right. If after appearing and pleading, the defence is neglected or abandoned, the party is forever barred. Much more will this be the case if a party defends the cause and loses it.

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Let us now come to the only remaining point in the cause, viz.: was the recovery in the foreign attachment, a bar to the recovery of the present plaintiff? I do not understand this to be denied, if the proceedings have been fair. Some questions have been made as to the necessity of the garnishee giving notice of the attachment to the defendant, and there is one case, 3 Wilson, 297, Fisher and Lane, in which it was held necessary, and that for want of it, the defendant, whose money or goods have been attached or taken from the garnishee, may recover again from him. The prior and subsequent cases do not say so, and it is not necessary to give an opinion on the subject, because our acts of assembly do not require it; because they require the attaching creditor to give back, to restore it, if his debt is disproved, and because, in this case, the person who claims the money, had notice, and took defence, as appears from the evidence, and from the finding of the jury.

Where the attachment has been served, but proceedings on it are still pending, and the defendant sues the garnishee, the attachment pending must be pleaded in abatement, and is good. 5 Johns. 101, Embree and Collins v. Hanna. "Nothing," says Kent, C. J., in delivering the opinion of the court, "can be more clearly just, than that a person who has been compelled by a competent jurisdiction to pay a debt once, should not be compelled to pay it over again;" and after reviewing the cases, he comes to the conclusion that it would be a good defence, and says, "if then, the defendant would have been protected under a recovery, by virtue of the attachment, the same principle will support a plea in abatement of an attachment, pending and commenced prior to the present suit."

In our own state, a foreign attachment commenced and proceeded in, for some time, and then discontinued, was declared to be evidence, to stop interest, during the time it was pending.

It would be a waste of time to use arguments, or to cite cases to prove that the decision of a court of competent jurisdiction, upon the same point, is conclusive, where the same point comes [112] again in question *between the same parties, or privies; and the decision of a court on a special point, on which a court has extensive jurisdiction, or in which the proceedings are in *rem*, is conclusive on all the world. Thus, the discharge of an insolvent, under the clause called the bread act, is conclusive on all the world, when coming incidentally before another court. M'Kinney v. Crawford, 8 Serg. & Rawle, 354. Whoever has an interest, and has notice, and takes part in a trial, is bound, though not named in the record; thus a recovery in ejectment against a covenantor, is not evidence of the defect of

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the defendant's title against the covenantor, unless he had notice; but if he had notice, and especially if he defended the suit, it is conclusive. *Leather v. Poultney*, 4 Binn. 356; *Bender v. Fromberger*, 4 Dall. 436, in note. So the record of an action of trespass between B. and the *cestui que trust* of A., is evidence in a subsequent ejectment between B. and A., *Calhoun's Lessee v. Dunning*, 4 Dall. 129.

But it is said, the court did not answer the 4th point separately from the 5th and 6th, and there is error in this. And we are reminded by the counsel, that these points were drawn up with great care. I have long known that these propositions to be submitted to the court, are often drawn up with as much care as candour. I do not allude to this case more than many others. I gave my opinion when in the Common Pleas, in *Stewart v. Shoenfelt*, which was sanctioned by the then Supreme Court, 13 Serg. & Rawle, 356. The same opinion is to be found in many cases. The 4th, 5th, and 6th points all relate to the same matter, and whoever reads them and the charge, must see that they are all freely and fairly answered. If it is alleged that every proposition must be answered in the very words put by the counsel, I utterly deny it; counsel will select a part of the facts, and ask what is the law on those facts; now the jury are to find on all the facts, and not on any separate number of them, and often are to decide the cause on the facts, and the circumstances under which they occurred, and the intentions which attended those who did the actions or spoke the words, and it is the duty of a judge to state all this to a jury, and if he does not he does not do his duty.

The conduct of Robert Roberts may have been perfectly fair, and all his declarations precisely true, and yet that conduct and those declarations may have occasioned a verdict and judgment against Moses Coates, and yet Roberts not be liable. If his conduct was deceptive, and his statements untrue, and especially if this happened by collusion with Jones, I admit it may prevent the former trial on the *scire facias*, in the attachment, from being conclusive, and so the judge told the jury, and such was the issue trying, and they have found no collusion, misrepresentation, or neglect. This was the issue, and the only material issue which could be formed in the cause. Moses Coates had all the right of Isaac Coates, or he had no right; that he had notice was not denied at the trial or here; the only dispute was, whether he defended in the *scire facias*, alone, or in concert with Roberts; and it is perfectly immaterial which, for in either [*113] *case, that trial, verdict, and judgment, were conclusive on the matter now trying, unless there were collusion and fraud in Roberts. If the jury in this case found there was

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collusion, misrepresentation, or fraud, the former verdict and judgment were not conclusive, and they must a second time have tried whether Roberts accepted the order of Isaac to Moses, and whether that order was to pay Moses a debt, or to take the money out of the reach of Isaac's creditors. If the present jury believed there was no fraud, the cause was at an end; the other matters had been before decided, and could not be inquired into.

I need not more than mention the objection, that evidence alleged to be illegal, was given on the trial of the *scire facias*; the elder counsel passed it over properly; we cannot inquire into it here. The lawyer employed and feed by Moses, ought to have taken a bill of exceptions, and could have taken a writ of error; if Roberts had objected, it would have been considered. Roberts was not bound to take a writ of error; a stakeholder, and he was literally so, and never claimed any right, is not bound to take a writ of error; if another defends in his name, and will agree to be answerable for costs, he is bound to permit his name to be used for a writ of error; this was not asked of him.

Judgment affirmed.

Cited by Counsel, 2 Wh. 324; 3 Wh. 410, 606; 2 W. & S. 200; 7 H. 127; 1 Wr. 174; 3 Wr. 57; 4 S. 399; 6 S. 457; 13 S. 250; 15 S. 360; 24 S. 309; 29 S. 363, s. c. 2 W. N. C. 326; 6 W. N. C. 455; 10 W. N. C. 463.

Cited by the Court, 9 Barr. 52; 1 H. 458; 1 J. 52; 9 H. 449; 12 H. 268; 1 C. 301; 10 C. 228; 1 S. 140; 7 S. 118.

[PHILADELPHIA, FEBRUARY 4, 1833.]

Magoffin, Administrator of Patton, *against* Patton and Others, Executors of Patton.

Testator bequeaths to each of his children, six thousand dollars, to be paid to them respectively, as they severally arrive to lawful age, or on the day of marriage, which ever may first happen. The residue of his estate, whatsoever and wheresoever, he devises, and bequeaths to be equally divided among all his children, (naming them,) when his youngest child arrives at lawful age, to hold to them, their heirs, executors, administrators, and assigns, in equal shares, as tenants in common and not as joint tenants. He then by his will declares, that if either of his above-mentioned children die under age, and without leaving issue, the share given to the child so dying, shall be equally divided, share and share alike, among all his surviving children, and the lawful issue of any of his said children, or of any grandchild, or grandchildren, who may then be dead, having left such issue, as tenants in common in fee, such issue, if one person only, or if several persons, as tenants in common, in equal shares in fee, always taking such part as his, her, or their parent or parents would have taken, if living. The devises and bequests above mentioned, were the only provision which the testator made for the maintenance of his children. His personal estate was

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about equal to the amount of his debts, the money legacies to his children, and the bequests to his wife; and the "residue" of his property consisted almost exclusively of real estate. One of his children died in his minority, unmarried, and intestate. Held, that the bequest of six thousand dollars, vested in him immediately on the death of the testator, and that his administrator was entitled to recover it, with interest from the time of the death of the testator, no other provision having been made for the maintenance of the legatee, during his minority.

THIS was an amicable action instituted in this court, in which John Magoffin, administrator of Henry Patton, was plaintiff, and Tace *W. Patton and others, executors of Robert [*114] Patton, deceased, defendants. It was entered for the purpose of determining the right of the plaintiff, to recover a legacy of six thousand dollars, which was bequeathed by the defendant's testator in his last will and testament, to the intestate of the plaintiff, who claimed it with interest from the time of the testator's death. A case was stated for the opinion of the court, and the questions arising upon it, were argued by *Purdon*, for the plaintiff, and by *Stroud* and *Bradford* for the defendants.

Everything that is material in the case will be found in the opinion of the court, which was delivered by

KENNEDY, J.—From the case as stated and agreed on by the parties for the opinion of the court, it appears, that Robert Patton, the testator, by his will, dated the 12th day of December, 1813, and proved the sixth of January, then next following, after giving to his wife certain bequests of personal property, and also one-third part of all the rents, income, and profits, of his real estate, during her natural life, bequeathed to his children, of whom Henry, the intestate of the plaintiff, was one, in the words following to wit: "4. Item, I give and bequeath to each and every, my children, the sum of six thousand dollars a piece, to be paid them respectively, as they severally arrive to lawful age, or on the day of marriage, whichever may first happen. 5. Item, All the rest, residue, and remainder of my estate, whatsoever, and wheresoever, I give, devise, and bequeath to be equally divided among all my children, (when my youngest child arrives at lawful age,) namely, John C. Patton, Robert B. Patton, Cornelia Patton, William Patton, Mary Patton, Henry Patton, and Catherine Patton, to hold to them, my said children, their heirs, executors, administrators, and assigns, respectively, in equal shares as tenants in common, and not as joint tenants. 6. Item, My will is, I do hereby provide, that if any or either of my above-mentioned children shall happen to depart this life, under lawful age, and without leaving any lawful issue, that then the part or parts, share or shares devised and bequeathed,

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by this my will, in my estate, to any or either of them, my children so dying, shall go to and be equally divided, share and share alike, among all my surviving children, and the lawful issue of any of my said children, or of any grandchild or grandchildren, whom may then be deceased, having left such issue, as tenants in common in fee; but such issue of any my deceased child or children, grandchild or grandchildren, if one person only, or if several persons, as tenants in common in equal shares in fee, always taking only such part or share thereof, as his, her, or their parent or parents would have had, and taken under, and by virtue of this my will, had he, she, or they been living."

The testator appointed five executors, of whom the defendants in this action, are the survivors, giving them power to sell his real estate for the payment of his debts or legacies. The [*115] devises and bequests *already recited, were the only provision which the testator made for the support and maintenance of his children. The personal estate was about equal in amount to that of his debts, and the money legacies to his children, and bequests to his wife, above mentioned; so that the "rest, residue, and remainder of his estate," consisted almost exclusively of real property, the income of which has not, in any one year, exceeded thirteen hundred dollars.

The children of the testator were born in the following order of time. John C., on the 14th of January, 1793. Robert B., on the 25th of September, 1794. Cornelia, on the 23d of November, 1796. William, on the 23d of August, 1798. Mary, on the 13th of August, 1800. Henry, on the 14th of April, 1804, and Catherine, on the 4th of July, 1813. The five first named of them, received each from the executors at lawful age, or marriage, six thousand dollars, and the four first of them were paid their respective six thousand dollars anterior to 1820. Henry Patton died in his minority unmarried and intestate, on the 29th day of March, 1820, upon whose estate, letters of administration were granted in due form to the plaintiff.

Upon this state of facts the plaintiff claims the six thousand dollars bequeathed to Henry, his intestate, as a legacy which vested in him immediately upon the death of the testator, the principal whereof was to be paid "as he arrived to lawful age, or on the day of his marriage, whichever should first happen," and as no special provision was made by the testator, who was his father, for his maintenance during his helpless state of minority, the plaintiff also claims interest upon the principal from the death of the testator, down to the present time.

To this it is objected on the part of the defendants, *First*,

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That the legacy to Henry, the intestate of the plaintiff, was contingent, and not vested.

Second, If it should be adjudged to be vested, still, according to the terms of the will, and the intention of the testator, as thereby manifested, it became divested immediately upon Henry's dying in his minority without issue, and must go according to the disposition that is made in the sixth item of the will.

And *lastly*, If the plaintiff be entitled to recover the six thousand dollars, he ought not to have interest allowed to him on it, before the time appointed in the will for the payment of it.

In *Jackson v. Jackson*, 1 Ves. 217, where the testator bequeathed in the following terms: "*Item*, I give four hundred pounds to R. (a son of the testator,) to be paid him at the end of one year after my death, and the further sum of one hundred pounds at the death of his mother," making his wife, the mother of the legatee, executrix and residuary legatee, who survived the son, Lord Hardwicke held, "that the one hundred pounds was plainly a vested legacy, and the time of payment only postponed; for the former words 'to be paid,' must be carried on, as they would plainly be if turned into any other language."

*Also in the case of *Sidney v. Vaughan*, 2 Eq. Ca. [*116] Abr. 211, C. Pl. 4, where the testatrix bequeathed to Edward Vaughan one hundred pounds, to be paid to him within six months after he should have served his apprenticeship; he ran away from his master and died: it was decreed that the serving the apprenticeship was not a condition annexed to the legacy, but only an appointment when it should be paid, and the rather, for if Edward had died before the expiration of his apprenticeship, his representatives would have been entitled to the legacy. This decree upon appeal to the House of Lords was affirmed. • 2 Brown, P. C. 347, 254.

Where a legacy is given at a future time, it is contingent, but where it is given to be paid at a future time it is vested; the time being considered in the latter instance annexed, not to the gift of the legacy, but to the payment of it. *Hixon v. Oliver*, 13 Ves. 113.

Mr. Roper in his *Treatise upon Legacies*, has collected and referred to the most of the cases on this subject, from which he has very fairly extracted the following rule: That when a legacy is given to a person to be paid or payable, at or when he shall attain the age of twenty-one, or at a future definite period, the interest in the legacy shall be considered to be vested in the legatee immediately upon the testator's death, as *debitum in presenti solvendum in futuro*, the time being only annexed to the

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payment and not to the gift of the legacy ; so that if the legatee happen to die before the payment arrives, his assignee or personal representative will be entitled to the legacy. Vol. 1, ch. 10, sec. 2, p. 376, (Phila. ed. of 1829.)

The words of the testator, in the case under consideration, are : " I give and bequeath to each and every my children, the sum of six thousand dollars apiece, to be paid them respectively as they shall arrive to lawful age, or on the day of marriage, whichever may first happen." Something was said in the argument of this case of the conjunction "as" which is used by the testator, and that it imported a condition, and made the legacies of six thousand dollars conditional or contingent. It may be, that this word is sometimes used in a conditional sense. Indeed, there are few words in our language which have not more meanings than one affixed to them ; and the context must always determine the sense in which they were intended to be used. Adopting this criterion here, it is very evident that "as" is not to be understood in a conditional sense. It clearly refers to a certain point of time. One of the meanings affixed to it by lexicographers, is, "at the same time that." Now let this meaning be substituted, and we shall find that it accords so exactly with the context, that it is impossible to doubt of its being the true one. The clause will then read thus, "to be paid at the same time that they severally arrive to lawful age, or on the day of marriage, whichever may first happen." And the words employed in this latter clause, which is given as an alternative for the payment of these legacies, "or on the day of marriage," could not be reconciled with any other meaning. But if the word "as" could be understood in a conditional [*117] sense, it would not change the character of the legacies ; they would still be vested because it is merely annexed to the payment and not to the gift of them. 1 Roper on Leg. 387-8. The particular legacy of six thousand dollars to Henry, is, therefore, clearly a vested legacy.

This brings us to the consideration of the next ground of objection to the plaintiff's recovery, which is, that although the legacy be vested, it was divested by Henry's dying, before he attained twenty-one, without issue, under the operation of the sixth item in the will.

There is no doubt but a legacy may be given in such terms as to vest in the legatee immediately, upon the death of the testator, subject to a divesture of it in the event of the legatee's dying before the time appointed for the payment of it shall come round. See 1 Roper on Leg. 403-4, *et seq.*

But then a legacy that is vested is not to be divested by ambiguous or dubious terms. It must appear clearly that it

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was the intention of the testator that it should be so in a certain event.

In the construction of wills, the intention of the testator is certainly the main thing to be attended to, and if not repugnant to some rule of law, or settled principle of policy, ought, so far as it is clearly expressed, to be carried into effect. But the application of certain rules are oftentimes necessary in the construing of wills, even to ascertain what it was that the testator intended. Of this number, I consider the rule which requires that every instrument of writing shall be so construed, if practicable, as to make it consistent with itself in all its parts, one which ought never to be lost sight of; for inconsistency not being very good evidence of sanity of mind, ought not to be imputed, as long as it can be avoided, to persons esteemed capable of making either contracts or wills. Now, by the express terms of the sixth item in the will, the limitation over in favour of the survivors there mentioned, is to take effect in the event of any of the children of the testator dying "under lawful age, and without leaving any lawful issue." But the particular legacies of six thousand dollars, given to each of the children, are made payable at the lawful age, or on the day of marriage of each respectively, whichever should first happen, so that they might have become payable long before the legatees, or at least some of them, attained twenty-one. A man marrying one of the daughters, say at the age of twelve or later, during her minority, would have been entitled on the day of his marriage, in right of his wife, to have received the legacy of six thousand dollars from the executors. Then suppose it had been paid to him, and in two or three weeks afterwards, that his wife had died in her minority, without leaving lawful issue; could the executors in such case have compelled the husband to refund the legacy, or can it be believed that such a thing was ever contemplated or designed by the testator in making his will, or that he intended the six thousand dollars should be refunded by any one of *them, after he or she had received the same under [*118] the express authority of his will? Taking the will altogether, I cannot think that we are warranted in coming to the conclusion that he intended that any of those particular legacies should be repaid after they were once duly received. But if we were to hold that they are embraced within the provisions of the sixth item, it would necessarily lead to that result. By restricting, however, the sixth item to that portion of the testator's estate which is disposed of by the fifth item in the will, it appears to me that it will not only preserve harmony and consistency in the will itself, but promote and carry into effect with more certainty the intention of the testator. Beside, I

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think that any other construction would render the execution of it difficult, if not altogether impracticable under certain circumstances, which might readily occur. But if from the whole face of the will, it be in the least degree doubtful, whether the testator intended to include these particular six thousand dollar legacies in the sixth item, the plaintiff is entitled to recover, for without a perfectly clear manifestation of such intention, they having become once vested, cannot be divested. These words of the sixth item, "part or parts, share or shares, devised and bequeathed by this my will in my estate," without other words or clauses to qualify or restrain their meaning, are no doubt sufficiently comprehensive to embrace these particular legacies, but then they are general, and do not refer to these legacies specifically, which leaves the clause open to the proper influence of the other parts of the will, and to receive that construction which seems necessary in order to give consistency to it, as a whole.

It is worthy of observation that the testator made his will but a few days before his death, from which we may fairly presume that his estate was nearly the same in amount as well as in kind at the time of making the will that it was at the time of his death. It is then fair to infer that he knew the value of his personal estate, and that the payment of his debts, together with the specific bequest to his wife, and the particular six thousand dollar legacies to his children, would consume the most, if not the whole of it; so that with the exception of the remainder, after the life estate, in some articles of household furniture and plate, specifically bequeathed to his wife, his real estate was all that remained to be disposed of in the residuary clause of the will, which is the fifth item. It is also obvious, that the terms of this clause are very particularly adapted to the disposal of real estate, by the introduction of words of inheritance. And again, in the immediately succeeding item, which is the one relied on by the defendants to defeat the plaintiff's recovery, all the estate which is thereby disposed of, is given to the persons therein designated, "as tenants in common in fee." These last words "in fee," are peculiarly applicable to real estate, and altogether unnecessary to be used in disposing of personal, and being so nearly the same with those used in the residuary clause, immediately preceding, that I feel inclined to believe that the

[*119] generality of the clause already *noticed in this sixth item, is thereby restrained to the property disposed of in the residuary bequest and devise, and that the particular legacies in the fourth item were not intended to be included. But what weighs most of all with me on this point is, that the testator has directed the particular legacies given in the fourth

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item, to be paid on the day of marriage of the legatees, respectively, without regard to their age in that case, when in the sixth item, the limitation over is made to depend upon "their dying under age, and without leaving lawful issue," an entirely different event, and one incompatible with that on which the legacies are made payable.

Taking this view of the case, I am decidedly of opinion, that the plaintiff is entitled to recover the six thousand dollars, the principal of the legacy; and this brings us to the consideration of the question of interest.

The general rule seems to be, that where legacies are given payable at a certain time, they carry no interest before that time; for interest is allowed for delay of payment, and consequently, till the day of payment comes round, no interest is demandable. But the exception is equally well settled with the rule, that where the legatee is a child of the testator, and a minor, incapable of supporting himself, or one to whom the testator has placed himself *in loco parentis*, and no special provision is made for the maintenance of the legatee, interest will be allowed on the legacy, although not payable until a future time, as upon the legatee's attaining full age: For the purpose, in such case, of maintaining the legatee, interest must be paid on the legacy, whether it be particular and vested, as in the present case, or particular and contingent, or whether it be residuary and vested, or contingent. See 2 Roper on Leg. 190, ch. 20, sec. 3, and 192, sec. 4.

In *Heath v. Perry*, 3 Atk. 101, Lord Hardwicke says, "where a legacy is actually vested, as if given to A., payable at twenty-one, yet it shall not carry interest, unless something is said in the will that shows the testator's intention to give interest in the meantime. But all these cases are subject to this exception, if it is in the case of a child; for then let a testator give it how he will, either at twenty-one or at marriage, or payable at twenty-one, or payable at marriage, and the child has no other provision, the court will give interest by way of maintenance, for they will not presume the father inofficious, or so unnatural, as to leave a child destitute." The doctrine here laid down by Lord Hardwicke, which is supported to its fullest extent in the case mentioned below, rules the question of interest in the case before us. *Glyde v. Wright*, 1 Cha. Rep. 265, octavo ed.; *Harvey v. Harvey*, 2 P. Wms. 21; *Green v. Belchier*, 1 Atk. 507; *Incedon v. Northcote*, 3 Atk. 438; *Hearle v. Greenbank*, *Ib.* 716; *Coleman v. Seymour*, 1 Ves. 210-11; *Beckford v. Tobin*, 1 Ves. Jr. 300; *Carey v. Askew*, 2 Bro. C. C. 58.

I am therefore of opinion, that as Henry Patton the legatee in this case was a minor child of the testator, incapable of sup-

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[*120] porting himself, *and left without an adequate provision for his maintenance, besides this legacy, that the plaintiff is also entitled to recover interest upon it from the time of the death of the testator.

Judgment for the plaintiff.

Cited by Counsel, 5 W. & S. 518; 11 H. 153; 6 C. 177; 5 S. 333.

Approved, 12 Wr. 83; 10 S. 349; 12 S. 140; 20 S. 204; 21 S. 404; 7 O. 590; 13 W. N. C. 283.

Cited by the Court, 1 H. 504; 7 H. 54; 6 N. 161.

These cases affirm the rule that interest on legacies which are not to vest until the legatee comes of age, must be paid to maintain him, but do not go so far as to allow the principal to be taken for that purpose.

[PHILADELPHIA, FEBRUARY 6, 1833.]

Nisbet and Another *against* Patton and Others.

IN ERROR.

The conversion by one partner of property, which came into the possession of the firm on partnership account, is the conversion of all, and makes all liable in trover.

ON the return of a writ of error to the District Court, for the City and County of *Philadelphia*, it appeared that this was an action of trover, brought by James Patton and others, assignees of Henry Simpson, against Michael Nisbet and David C. Wood, trading under the firm of Michael Nisbet & Company, for the conversion of six promissory notes, drawn by different persons, in favour of Henry Simpson.

Simpson, who was a dealer in dry goods, had been in the habit of depositing goods with the defendants below, who advanced their notes upon them. The notes for the conversion of which this suit was brought, had been placed in the hands of the defendants below, with an understanding, that when goods were deposited with them, the notes were to be returned. On the day of Simpson's failure, which took place on the 12th January, 1826, he deposited a quantity of goods with the defendants, and on the following day he executed to the plaintiffs below an assignment for the benefit of his creditors. On the same day his assignees sent to demand the notes. Nisbet, on whom the demand was made, said he would deliver the notes, but could not get them then, as they were locked up in his fireproof, and his bookkeeper was gone home with the key, but promised on the honour of a gentleman, to give them up in the morning. On being called on again on the following morning, he said that he would not

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give them up, or that he had not them. The demand was made on Nisbet alone, Wood not being present.

On the part of the defendants below, it appeared that Michael Nisbet, a short time previous to the formation of the partnership of Michael Nisbet & Co., of which David C. Wood was a partner had been a partner in another firm, trading under the firm of Cohen & Nisbet; that by the terms agreed upon at the dissolution of the latter firm, he was authorized to settle its affairs, and that Simpson was indebted to the firm of Cohen & Nisbet to a larger amount than that which was claimed by the plaintiffs in this cause. Nisbet, therefore, claimed a right to retain the notes in controversy, alleging that *he had a lien upon them for the debt due by Simpson to the firm of Cohen & Nisbet. [*121]

The defendant then produced and gave in evidence a promissory note, dated the 2d of August, 1825, at six months, for five hundred and twenty-five dollars and seventeen cents, drawn by Henry Simpson in favour of Cohen & Nisbet; another note dated the 11th of August, 1825, at six months, for four hundred and three dollars and twenty cents, also drawn by Henry Simpson in favour of Cohen & Nisbet, and a third note dated August 13th, 1825, at six months, for four hundred and forty-five dollars and twenty cents, drawn by Henry Simpson in favour of Cohen & Nisbet. They also gave in evidence a copy of an account current, dated 13th March, 1826, rendered by Michael Nisbet & Co., to the assignees of Henry Simpson, showing a balance of two hundred and fifty-three dollars and fifty-eight cents, due to the assignees, and a receipt for that sum dated the 14th of March, 1826.

The counsel of David C. Wood, requested the judge who tried the cause in the court below to charge the jury, "That if they believed from the evidence that Nisbet detained the notes in controversy on behalf of Cohen & Nisbet, and not on behalf of Michael Nisbet & Co., then David C. Wood is not liable, and the jury ought not to find a verdict against him."

The counsel for the plaintiffs below requested the judge to charge the jury as follows:

"1. That if the promissory notes for which this action is brought, were placed in the hands of the defendants as a temporary security for moneys advanced to Henry Simpson, until a security in goods should be delivered, and that security was afterwards deposited, the defendants had no lien upon the notes against Simpson or his assignees as a security for any claim of another firm of which the defendants, or one of them, were or was a member.

"2. That if the notes in question were so delivered to the defendants for a specific purpose, after that purpose was com-

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plied with, the defendants are answerable in this action after demand and refusal by the plaintiffs, and it is of no consequence to the validity of the plaintiffs' claim against the defendants, that one of them alone retained the notes for a purpose in which he alone was interested."

The judge instructed the jury as he was requested by the counsel for the plaintiffs, and added, that the action being trover, the doctrine of set-off did not apply ; but had the action been one of contract, as the notes were not due when the suit was brought, set-off could not be permitted : That there being no defence either by way of lien or set-off, and the defendants being co-partners in business, and having as such received the notes for a particular purpose, whenever that purpose was complied with, they were bound to surrender the notes ; and the circumstance of Wood's not taking an active part in the business, and not having been present when the demand was made on [*122] *Nisbet, and Nisbet's retaining the notes for the debt of Cohen & Nisbet, did not absolve Wood from liability in this action.

With respect to the point propounded by the counsel of Wood, his Honour said, that he was unable to instruct the jury as he was requested. The law was not so, but just the contrary. The defendants being partners, and the notes in question having been delivered to Michael Nisbet for purposes connected with the business of the partnership, the conversion of one was, in point of law, the conversion of both.

The jury found a verdict for the plaintiffs, and the defendants sued out a writ of error.

Stroud, for the plaintiffs in error, cited *Vasse v. Smith*, 6 Cranch, 226 ; 2 Phil. Ev. 125 ; *White v. Demary*, 2 New Hamp. Rep. 546 ; Bull. N. P. 44 ; 2 Saund. on Pl. and Ev. 478 ; Collier on Part. 253.

Rawle, Jr., contra, referred to Gow on Partnership, 52, 79, 174, 175 ; *Durell v. Mosher* 8 Johns. Rep. 347 ; 1 Maule & Selw. 388.

The opinion of the court was delivered by

GIBSON, C. J.—The case of *White v. Demary*, 2 N. H. Rep. 546, though apparently in point, depended on a principle entirely distinct from that which governs the transactions of partners. There the defendants were but joint bailees ; and the law is settled that the act of a tenant in common shall not prejudice the title of his co-tenant or charge him with a tort. It is other-

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wise with partners, each of whom constitutes the other a general agent of the firm, with power to bind it, not only by his contracts, but by his acts in the scope of the business. His authority to contract has never been disputed; and the responsibility of the firm for the legal consequence of his acts, stands on a principle equally settled. Thus in *Willet v. Chambers*, Cowp. 814, an attorney whose partner had received money to be laid out on a mortgage, was held liable for it though the mortgage was forged by the receiving partner without the knowledge of the other. The same principle was held in the *Manufacturers' and Mechanics' Bank v. Gore*, 15 Mass. Rep. 75, and *Boardman v. Gore*, Ib. 331; and it has been decided in *Biggs v. Lawrence*, 3 T. R. 454, that a trading on joint account in contraband goods, will implicate an innocent partner. So in *Hadfield v. Jameson*, 2 Munf. 65, it was determined that the fraud and misconduct of one part owner which produced the loss of a ship and cargo affected the claim of both to freight under a charter party. It is, however, conceded that both would have been answerable here for the act of Nisbet in an action on the contract to re-deliver the notes after the purposes of the deposit were satisfied; and this concession includes the decisive fact, that the refusal of Nisbet was the refusal of his co-partner. Being so for any purpose, it must be so for every purpose; for it is not easy to see why it should be his act to charge him on a contract, and not his act to charge him with a tort. It is not doubted that partners may *be sued in trover where they join in the conversion; and do they not join where the act of one is the [*123] act of all?

It can be of but little account to them whether they are made to respond in the one sort of action or the other; for though it be true that there is no contribution between tort feorsors, it is equally true that a partner may be made answerable to the firm for misconduct in involving it in responsibility. It is said indeed that trover to recover damages for a destruction of the joint property, is the only action founded in tort that can be maintained between partners. That would seem, however, to have been asserted without sufficient consideration; for it is not easy to see why a partner should not be answerable to the firm, as in any other case of principal and agent, for gross and wilful misfeasance. In *Hadfield v. Jameson*, it was taken for granted, that the delinquent partner was liable to the other for the loss of the ship; but certainly not in trover, for his acts were evidence of anything but conversion. The act then of Nisbet, being *prima facie* the act of his partner, was evidence of a joint conversion subject, however, to be rebutted by proof, if such

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there were, that the latter had openly disclaimed the act at the time; and the direction was in all respects essentially right.

Judgment affirmed.

Commented on by the Court, 11 N. 109.

[*PHILADELPHIA, FEBRUARY 11, 1833.*]

Lesley and Another *against* Randolph.

IN ERROR.

A lease for no determinate period of time, but by which an annual rent is reserved, payable quarterly, is a lease from year to year, so long as both parties please. It is binding on the parties prospectively for one year only, capable, however, of being extended to a second, third, fourth, or fifth year, and so on, unless determined by the dissent of either party, which may be done at the close of any one year by giving three months' previous notice to that effect, but at no time before the close of a year, after it has once commenced.

Consequently, where the tenant continues to hold the demised premises until after the commencement of the second year, without offering to surrender the possession to the landlord, or receiving from him notice to quit, he is entitled to hold for another year in despite of the landlord, but at the same time is bound to pay the year's rent quarterly, according to the agreement.

THIS was a writ of error to the District Court for the city and county of *Philadelphia*.

The plaintiffs in error, Robert Lesley and William Meredith, trading under the firm of Lesley & Meredith, were defendants below, in an action brought against them by the defendant in error, George F. Randolph, to recover part of a year's rent claimed under the circumstances set forth in the following case stated.

[*124]

*CASE STATED.

"The plaintiff as owner of the store or warehouse, No. 241 High street, in the city of Philadelphia, leased the same to the defendants on the 23d day of April, 1828, according to the terms of the following agreement, executed by the defendants, and assented to by the plaintiff, viz.:

"We have this day rented of George F. Randolph, the store or warehouse, No. 241 High street, the rent to be eight hundred dollars per annum, payable quarterly. It is expressly understood and agreed by us, that we are not to relet the premises, or

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any part thereof, to any person, or for any purpose or business, without the approbation and consent of George F. Randolph.

(Signed,) 'LESLEY & MEREDITH.

“Philadelphia, April 23d, 1828.”

“The defendants, immediately after the execution of this agreement, entered upon the premises and continued to occupy the same till July 23d, 1829, when they removed, having paid all the rent due at that time, and thereupon tendered the key of said store or warehouse to the plaintiff, who refused to receive it.

“On the 1st day of December, 1829, by the mutual consent of the plaintiff and defendants, and without prejudice to the rights of either party, the said store or warehouse was let to a third person.

“If the court be of opinion that the plaintiff had a right to consider the defendants as tenants of the premises for a second year, in consequence of their retaining possession under the above agreement of April 23d, 1828, after the expiration of the first year as above mentioned, judgment is to be entered for the plaintiff for two hundred and eighty-four dollars forty-five cents, and for interest on the same from December 1st, 1829, till the rendering of judgment, with costs of suit; otherwise judgment is to be entered for defendants with costs of suit; either party to be entitled to a writ of error.”

The District Court gave judgment for the plaintiff for three hundred and nineteen dollars and ten cents, and the defendants removed the cause to this court by writ of error.

Chauncey, for the plaintiffs in error.—The lease set out in the case stated, is either a lease for a year or for a quarter only. Whether it be one or the other is immaterial to the plaintiffs in error, for in either view of it, the judgment of the court below is erroneous. If the demise was for a year, then according to the case of *Logan v. Herron*, 8 Serg. & Rawle, 459, upon notice given before the expiration of the first quarter of the second year, the tenants might have been dispossessed by the landlord, and of course they had a right to quit at the time they did, or there would be a want of reciprocity in the obligations of the parties.

If the demise was for a quarter, it is equally plain that the tenants, having surrendered the property leased, and tendered the stipulated quarterly rent before entering upon the second quarter of the new year, were discharged from all further liability to the landlord. They had a right, if

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the lease was to endure for so short a term, to leave the premises at the end of the first quarter, or of any subsequent one. Such being the agreement of the parties, the landlord asked too much, when he demanded payment beyond the period for which the rent was tendered, and the court below erred in the judgment which gave it to him.

Stroud for the defendant in error.—The lease in this case was not for a definite period; it was not for a single year, or for any portion of a year, but was without limitation as to time, which, by construction of law, is a lease from year to year. A general taking at an annual rent, is a lease from year to year. *Chamb. Land. and Ten.* 355; *Comyn's Land. and Ten.* 8, 91, 303; 2 *Bl. Com.* 147; *Right v. Darby*, 1 T. R. 161. The decision in *Logan v. Herron*, which is supposed to interfere with the judgment of the court below, was the case of a lease for a fixed period, "for one year from the 1st of April, 1816," and the language of the court cautiously restricts the decision to such a case. "Where the termination of the lease is uncertain," says C. J. Tilghman, 8 *Serg. & Rawle*, 461, "and depends upon the will of the landlord, it is necessary that notice should be given during the lease. As where a lease is made for a year, and so from year to year as long as it pleases the landlord, or as long as it pleases both parties, if the landlord wishes to determine the lease, he must give notice three months before the expiration of the year." The same distinction is asserted by Judge Gibson, in page 470. The earlier case of *Bedford v. M'Elherron*, 2 *Serg. & Rawle*, 49*–50*, is to the same effect. *Diller v. Roberts*, 13 *Serg. & Rawle*, 60, which is the last reported decision of our courts upon the doctrine of an implied renewal of a lease, by the holding over of the tenant, and the omission of notice to quit by the landlord, contains nothing in opposition to what is contended for by the defendant in error, but is rather confirmatory of his views.

The opinion of the court was delivered by

KENNEDY, J.—It has been contended for the plaintiffs in error, that the agreement under which they took the warehouse, amounted only to a specific letting for one year, and no more; and that according to the decisions of this court, in the cases of *Boggs v. Black*, 1 *Binn.* 335, and *Logan v. Herron*, 8 *Serg. & Rawle*, 459, they became immediately upon the expiration of the year, to wit, the 23d of April, 1829, tenants at sufferance, liable to be turned out of possession at will of the defendants in error; and were not bound therefore to pay for the use of the warehouse after that, longer than they continued to occupy it; and

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were at liberty to surrender the possession at any moment they pleased. The nature of the lease in the latter of the above cited cases has been relied on as being substantially the same with the lease in the present case.

I however think there is a difference which has been recognised by *courts, judges, and writers on this branch of the [*126] law. In Logan & Herron the lease was specifically for one year. Nothing appears on the face of it from which any possible inference could be drawn, that it was within the contemplation of the parties that it should endure beyond that time. If either party therefore became desirous, at or before the expiration of the year expressly agreed on, to continue the relation of landlord and tenant beyond that period, he surely had no reason to calculate upon it without first knowing the will of the other party in respect to it, and if he did not choose to take the trouble of informing himself, I do not see any good reason he could afterwards have to complain that the other party, without giving him three months' notice previously to the expiration of the year of his intention, had resolved to decline all further renewal of the lease. It seems to be established in England, as well as here, that when a lease or demise is determinable on a certain event, or at a particular period, no notice to quit is necessary, because both parties are equally apprised of the determination of the term; and it is not material whether it be only for a single year, or any longer period. See Chamber's Landlord and Tenant, 750; Jordan v. Ward, 1 H. Bl. Rep. 97; Godsell v. Inglis, 3 Taunt. 54; Bing's Landlord and Tenant, 177; Cobb v. Stokes, 8 East, 358; Right v. Darby, 1 Term Rep. 163; Messenger v. Armstrong, 1 Ib. 53; Bedford v. McElherron, 2 Serg. & Rawle, 50*; Boggs v. Black, 1 Binn. 335; Logan v. Herron, 8 Serg. & Rawle, 459; Van Cortlandt v. Parkhurst, 5 Johns. 128; Adams on Ejectment, 101-2.

Now the lease or agreement in the case under consideration is not expressly for any determinate period of time, and it is only by construction that a limitation can be affixed to it. It, at an early period in England, would have been considered a letting at will, but as it is not so in express terms, it would at the time of our Revolution have been deemed a lease from year to year; and more especially so, as an annual rent is reserved to be paid. 2 Bl. Com. 147, Chitty's ed. and note (11). Adams on Eject. 102-3. Sir William Blackstone says, speaking of tenancies at will, "Courts of late have rather held them to be tenancies from year to year, so long as both parties please, especially where an annual rent is reserved." 2 Bl. Com. 147. In Bree v. Lees, 2 Bl. Rep. 1173, Lord Chief Justice De Grey, says, "All leases for uncertain terms are *prima facie* leases at will; it is the reser-

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vation of an annual rent that turns them into leases from year to year." And Sir J. Mansfield, Chief Justice, in *Richardson v. Langridge*, 4 Taunt. 131, lays down the same rule in a case put by him by way of illustrating it in the following words: "If there were a general letting at a yearly rent, though payable half yearly or quarterly, and though nothing were said about the duration of the time, it is an implied letting from year to year." Now this meets the description of the lease in question in every particular with the utmost precision, which is a general letting without anything being said as to the duration of the time, at a yearly rent of eight hundred dollars payable quarterly. [*127] It also comes directly within the description of a lease from year to year, as it is given by Messrs. Chambers, Bingham, and Comyns, who have each written and compiled a treatise on this subject. Mr. Chambers, in his work, page 355, says, that "a general taking at an annual rent is a lease from year to year." See *Bing. Landlord and Tenant*, 177, and *Comyn's Landlord and Tenant*, pp. 7, 8, 91, and 303, all to the same effect. Besides, it appears to me, that the intention of the parties to the lease in the present case, so far as it can be collected from the face of the writing itself, requires it to be construed a lease from year to year, and so on as long as both parties pleased; otherwise some determinate point of time as its end or fixed period of duration, would have been expressly mentioned. But if it were even doubtful whether such was the intention of the parties, still upon the principle that every lease is to be taken most strongly against the lessor, and this construction being the most favourable for the lessees it ought to prevail. There is also another view to be taken of this agreement, which still further satisfies me that this is the true construction to be put upon it, which is this: suppose the plaintiffs in error had continued to occupy the warehouse for the space of eighteen months or two years without having paid any rent, and without any dissent having been expressed to their so holding it, could they not have been distrained on at common law, or have been sued for the rent for the whole of the time which had elapsed under this agreement as an entire contract, which had by its terms opened at the commencement of every succeeding year to embrace it, and had become binding upon the parties for that year, in the same manner as if the agreement had been for a fixed and definite period which included it? There is certainly no objection to an affirmative answer to this question to be found on the face of the agreement; and without giving to it this construction, great injustice might occasionally accrue to either party. I however do not wish to be understood as entertaining the opinion that a lease for a year, and so from year to year as

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long as both parties shall please, is a lease for the term of two years certain at its commencement. My idea of it is this: that it is binding prospectively on the parties for one year only, capable however of being extended to a second, third, fourth, or fifth year, and so on, unless determined by the dissent of either party, which may be done at the close of any one year, by giving three months' previous notice to that effect, but at no time before the close of a year after it has once commenced.

Whether it be a lease in the first instance for one or two years certain, is a question upon which there has been some diversity of opinion.

Brooke, in his *Abr. tit. Tenant, per copy de court roll*, pl. 17, says, "By the best opinion it is a lease for years." This according to what is laid down in the *Bishop of Bath's Case*, 6 Co. 36, as necessary to constitute a lease for years would make it at least two years, as less would not satisfy the plural number. The case of *Agard v. King*, *Cro. Eliz. 775, declares [*128] it to be a lease for two years certain. In the *Bishop of Bath's Case*, 6 Co. 36, it was resolved, after three years at most, to be a lease at will; which Rolle in his *Abr.* 851, seems to think means a lease for two years at least, but after three years at most, only an estate at will. In *Bellasyse and Burbridge*, 1 Lutw. 213, it was held to be a lease for two years; and in *Stanfill v. Hickes*, 1 Ld. Raym. 280; s. c. 2 Salk. 413, 3 Ib. 135, it seems to have been considered a lease for two years, and after that a lease only at will. And in a late case of *Denn v. Cartwright*, 4 East, 31, it was pronounced to be a demise for two years at least. But as no authorities are vouched in the report of this case, it is probable that the decision was made without an examination of them.

On the other side in an anonymous case, 2 Salk. 413, it was held, if A. demised lands to B. for a year and so from year to year, that it was not a lease for two years and afterwards at will, but it was a lease for every particular year, and after the year was begun, the defendant could not determine the lease before the year was ended. s. c. *Holt's Rep.* 414, ruled by Chief Justice Holt, at the summer assizes at Lincoln, 1699. In *Leighton v. Theed*, 1 Ld. Raym. 707, Lord Chief Justice Holt ruled, that if A. make a lease to B. for a year, and so from year to year, *quandiu ambabus partibus placuerit*, A. may determine his will at the end of any year, but if a new year be begun, it cannot be determined before the end of it. He also ruled the same point accordingly at a trial upon the summer assizes at Lincoln, 1699, between Lely and Green.

In *Dod v. Monger*, 6 Mod. 215; s. c. Holt, 416, he said, "If a lease be for a year, and so from year to year as long as both

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parties shall please, it is a lease binding but for one year ; but if the lessee without countermand of the lessor, enter upon the second year he is bound for that year, and so on. And so in *Fenwick v. Lady Grosvenor*, 12 Mod. 610, he ruled the same to be a lease for one year absolutely ; and if the lessee continues on the first day of the second year, he is bound for that year also : and so is the lessor if he has not warned him away before the beginning of the second year."

I have adopted the opinion and decision of Ch. Just. Holt ; first, because I believe it was the settled law of his time ; next, because it comports best with the common and ordinary understanding and meaning of the terms employed in such leases ; and lastly, because I consider it as agreeing best with the true grammatical construction of them.

Indeed I feel altogether at a loss to conceive how the assent of the parties is to be made out for more at any time than one year prospectively and absolutely. But that it amounts to a positive agreement for one year I think is clear ; and further, if the holding should continue until a second year has commenced without the dissent of either party, it becomes a lease for two years certain, and cannot be determined by either party before the end of the second year ; and the meaning of the words "from year to year," is, that the holding shall only cease at the [*129] end of the year and at no other time ; and if the *holding were to continue in like manner for three, four, five, or six years, it would become, in respect to time past, and as a contract executed, a lease for just as many years as had elapsed : and at the end of six years, might be declared on as having been a lease for that number of years, by either party. This was expressly ruled and settled in *Legg v. Strudwick*, 2 Salk. 414, and in *Birch v. Wright*, where it is placed in a very clear and satisfactory point of view, by Mr. Justice Buller, 1 Term. Rep. 380.

Believing the lease in question then to be a lease from year to year, the plaintiffs in error, having continued to hold the demised property until after the second year had commenced, without offering to surrender the possession to the defendant in error, or having received from him any notice to quit, became tenants under the agreement, entitled to hold it for another year, in despite of the defendant in error ; but at the same time bound upon the principle of reciprocity to pay the rent of three hundred dollars quarterly. The defendant in error could only have put an end to the lease, by giving a notice to the plaintiffs in error, at least three months before the end of the year, to surrender to him the possession, as soon as that time should come around. This principle is settled or recognised in *Bedford v. M'Elherron*, 2 Serg. & Rawle, 50* ; *Brown*

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v. Vanhorn, 1 Binn. 334, in note; *Fahnestock v. Faustenauer*, 5 Serg. & Rawle, 174; *Thomas v. Wright*, 9 Serg. & Rawle, 87. Indeed, wherever the lease is not for any precise, express, and determinate period of time, notice seems to be requisite, as a reasonable and necessary protection against surprise, and the consequent loss or inconvenience that might result therefrom; and has, in modern times, been extended to a tenancy at will, on account of its uncertain duration. See *Parker v. Constable*, 3 Wills. 25.

We think that the judgment of the District Court was right, and it is therefore affirmed.

Judgment affirmed.

Cited by Counsel, 2 Wh. 44, 164; 8 Barr. 283; 10 Barr. 41; 7 H. 437; 9 H. 95; 8 C. 368; 4 S. 87; 7 S. 186; 32 S. 312; 4 O. 207, s. c. 13 W. N. C. 241; 2 W. N. C. 376, 419.

Cited by the Court, 9 Barr. 273; 1 Par. 310.

It has been recently ruled that where a tenant from month to month holds over after the first year, his tenancy does not change into one from year to year, but continues as before, and a month's notice at any time is all that it is necessary for him to give. 4 O. 207, s. c. 13 W. N. C. 241.

*[PHILADELPHIA, FEBRUARY 11, 1833.]

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Bertsch *against* The Lehigh Coal and Navigation Company.

APPEAL.

Parol evidence may be given to explain a written agreement, so far as to give locality and identity to the subject-matter of it, and apply the contract to it.

Therefore, where in a proceeding under the acts, incorporating the Lehigh Coal and Navigation Company, to recover damages for injuries done by the company to the land of the plaintiff, the defendants pleaded in bar, a written agreement for the purchase of the plaintiff's land, through which the defendant's canal was to pass, it was held, that the plaintiff might give parol evidence, that, at the time the agreement was entered into, the line or route of the canal was laid out and designated by stakes, set up through the plaintiff's land; that the written agreement was made in reference to this line; that the land lying between it and the river is the same land that is described in the agreement, and that the defendants, instead of confining themselves to this line, as then staked out, in constructing and making their canal, or, at least, keeping between it and the river, extended the canal beyond the line, and further from the river into the other land of the plaintiff, and thus cut off a greater quantity of land from the main body of his farm, than was agreed on.

But parol evidence is not admissible to show that the defendants agreed to build two locks upon that part of the canal which passed through the plaintiff's land, as a part of the consideration he was to receive for parting with it to the defendants; the written agreement containing no such provision.

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The remedy given by the acts of assembly, incorporating the Lehigh Coal and Navigation Company, to the owner of the land, to recover damages for injuries done by the company in constructing their works, can be resorted to only where the parties are unable to agree upon the compensation to be made to the owner of the land. Where an agreement has been entered into, the remedy is by suit on the agreement. But if the company, after such an agreement, without regard to it, go on and make their canal through land different from that which was agreed on, the owner is at liberty to rescind the contract, and proceed under the acts of assembly.

THIS was an appeal from the decision of Judge Huston, holding the Circuit Court of *Northampton* county, in September, 1831.

It was a proceeding under the acts of 20th March, 1818, entitled "An act to improve the navigation of the river Lehigh," (Pam. Laws, 197,) and of the 13th February, 1822, entitled "An act to incorporate the Lehigh Coal and Navigation Company." (Pam. Laws, 21.)

The first section of the act first mentioned, authorized Josiah White, George F. A. Hauto, and Erskine Hazard, their heirs and assigns, to enter upon the river Lehigh, to open, enlarge, and change its channel, &c., to make dams, locks, or any other device which they should think fit and convenient, to make a good navigation downward, &c. The second section provides, "that if any person or persons shall be injured, by means of any dam or dams being erected, or the land of any person inundated by swelling the water by means of any dam or dams, or any mill or other water-works injured by swelling the water into the tail-race of any mill or other water-works which may have been erected in the said river, and if the said Josiah White, George F. A. Hauto, and Erskine Hazard, their heirs and assigns, [*131] *cannot agree with the owner or owners thereof, on the compensation to be paid for such injury, the same proceedings shall be had as are provided in the third section of this act," &c.

The third section enacts, "that the said Josiah White, George F. A. Hauto, and Erskine Hazard, their heirs and assigns, shall have authority and power, by themselves, or their superintendents, engineers, artists, and workmen, to enter in and upon and occupy for the purpose, all land which shall be necessary and suitable for erecting a lock, sluice, canal, tow-path, or other device, doing as little damage as possible, and there to dig, construct, make, and erect such lock, sluice, canal, tow-path, or other device, satisfying the owner or owners thereof; but if the parties cannot agree upon the compensation to be made to such owner or owners, it shall and may be lawful for the parties to appoint six suitable and judicious persons, who shall be under oath or affirmation, and who shall reside within the

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proper county where the land lies; or if they cannot agree on such persons, then either of the parties may apply to the Court of Common Pleas of the proper county where the land lies, and the said court shall award a *venire*, directed to the sheriff, to summon a jury of disinterested men, in order to ascertain and report to the court, what damages, if any, have been sustained by the owner or owners of the ground, by reason of such lock, canal, sluice, tow-path, or other device passing through his, her, or their land; which report, being confirmed by the court, judgment shall be entered and execution shall issue, in case of non-payment, for the sum awarded, with reasonable cost, to be assessed by the court. And it shall be the duty of the jury, or the six appraisers, as the case may be, in valuing any land, to take into consideration the advantage derived to the owner or owners of the premises from the said navigation: *Provided*, that either party may appeal to the court, within thirty days after such report may have been filed in the prothonotary's office of the proper county, in the same manner as appeals allowed in other cases," &c.

The fourth section provides, "that the said Josiah White, George F. A. Hauto, and Erskine Hazard, their heirs and assigns, by and with their superintendents, engineers, artists, workmen, and labourers, with their tools, instruments, carts, wagons, and other carriages, with beasts of draught and burthen, may enter upon the lands contiguous and near to the said river, giving notice to the owners or occupiers thereof, and from thence take and carry away any stone, timber, gravel, sand, earth, or other material, doing as little damage thereto as possible, and repairing any breaches they make in the inclosures thereof, and making amends for any damages that may be done thereon, and paying for the materials to be taken away, the amount whereof, if the parties do not agree, shall be assessed and valued by any three disinterested freeholders residing in the neighbourhood, under oath or affirmation, to be appointed by consent of parties, or, if they cannot agree, by any disinterested justice of the peace of the *proper county, allowing an appeal to the Court of Common Pleas, as in [*132] the third section of this act."

On the 13th of February, 1822, an act of assembly was passed, (Pam. Laws, 21,) to incorporate "The Lehigh Coal and Navigation Company," the preamble of which recited the act of the 20th March, 1818, "to improve the navigation of the river Lehigh," by which certain rights were vested in Messrs. White, Hauto, and Hazard. It further recited, that they had conveyed to the Lehigh Navigation Company all the rights granted to them by that act, reserving certain residuary profits:

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That Messrs. White, Hauto, and Hazard had purchased certain leasehold and freehold estates in sundry tracts of coal-land, situate on and near the river Lehigh, which, for the purpose of raising funds, they had conveyed to trustees, for the use of certain persons furnishing the funds, and associated under the name of the "Lehigh Coal Company," reserving certain residuary profits and exclusive rights in the management of the company: That these companies had united and amalgamated themselves into one company, under the name of "The Lehigh Navigation and Coal Company," confirming to Messrs. White, Hauto, and Hazard the residuary profits and exclusive rights reserved by them: That Hauto had agreed to convey all his rights to White and Hazard, which agreement had been carried into effect, and the funds of the company being still insufficient for the objects of the association, it was agreed between the stockholders in the said company and the said White and Hazard, that the name of the company should be changed to that of "The Lehigh Coal and Navigation Company:" That the capital stock should be increased by the admission of new subscribers, and that, in consideration thereof, and of certain shares in the stock of the new company, to be given to them, White and Hazard should release to the company their reserved rights, and convey to trustees, for the use of the stockholders in the new company, all their rights to the water-power, and come in as simple stockholders under the new association, &c. The act, therefore, in the first section incorporated the new company by the name of "The Lehigh Coal and Navigation Company," with the usual corporate powers, &c. The second section vested the property of the former association in the new corporation, and provided that its contracts should continue in force. The third section confirmed to the corporation the rights and privileges granted to Messrs. White, Hauto, and Hazard by the act of 20th March, 1818. The seventh section declares, that in the appraisement of damages and valuation of materials, provided for by the second, third, fourth, fifth, or any other section of the above-mentioned act, if either party shall require it, the referees or persons composing the jury of valuation, shall not be taken from within seven miles of the river Lehigh.

The complaint of the plaintiff set forth, that the Lehigh Coal and Navigation Company, on the 1st October, A. D. 1827, and at divers other days and times, between that day and the day of the presentation of the original petition in this case, by their [*133] superintendents, *engineers, artists, and workmen, by virtue of the authority and power given to them by an act of the general assembly of this commonwealth, passed the 13th of February, 1822, entitled "An act to incorporate the

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Lehigh Coal and Navigation Company," and the several acts supplementary thereto, did enter upon and occupy the land of the said Christian Bertsch, being a tract of land containing one hundred and sixty acres and one hundred and forty-six perches, situate in the township of Lehigh, in the county of Northampton, and did then and there, dig, construct, erect, and make a certain canal, tow-path, and berm bank on the said land of the said Christian, extending for a distance of two hundred perches in length, and occupying thereby a large portion of the said land, that is to say, eleven acres and forty-two perches thereof, without making compensation therefor; and did then and there throw open the fences of the said Christian on his said land, and did, for a long space of time, that is to say, during all the time aforesaid, occupy the meadow and other lands of the said Christian, in the said township, by their superintendents, &c., by their carts, &c., passing and repassing the same, thereby treading down and destroying the grass and herbage there growing, and destroying the fences and hedges of the said Christian there standing; that is to say, two hundred perches of said fence, and did then and there further, by means of certain dams being erected, inundate the lands of the said Christian situated as aforesaid, that is to say, five acres of arable land and five acres of meadow land, and did greatly injure the distillery of the said Christian by lessening the business and profits thereof, and did also greatly injure and lessen the business and profits of the wool-carding machine of the said Christian, and did also greatly injure the business and profits of the blacksmith's shop of the said Christian there, and did, by means of the said canal, berm bank, and dams, divert and change the course of the streams of water issuing and running from three certain springs of water issuing on the land of the said Christian, in the township aforesaid, by which his meadow land and arable land, viz., ten acres of meadow land and ten acres of arable land were inundated with water, and destroyed, and rendered entirely useless to the said Christian, to wit, at the county aforesaid, and other wrongs to the said Christian then and there did, for which he has received no compensation: By means whereof he, the said Christian, hath sustained damages to the value of four thousand dollars.

The defendant pleaded as follows:—"And the said the Lehigh Coal and Navigation Company, by *J. M. Porter*, their attorney come and defend the wrong and injury when, &c., and say, that the said Christian ought not to have instituted this proceeding, and ought not to have and maintain his action thereof against them, because they say, that heretofore, to wit, on the 3d August, 1827, the said Christian and the said company entered into an

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agreement in writing, sealed with the seal of the said Christian and of Jonathan Fell, President of said company, on behalf of said [*134] company; one part of which said agreement, *sealed with the seal of the said Christian, the said company bring here into court, the date whereof is the day and year aforesaid, whereby the said Christian agreed to sell, and the said Jonathan, on behalf of the said company agreed to buy all the lands belonging to the said Bertsch which might be occupied by the canal improvements then about to be made by the said company along the river Lehigh, and likewise all his (the said Christian's) land, which should be comprised between the said canal and the river, at the price of twenty-five dollars per acre, the said Bertsch to make the said company a good and legal title for the same, free from all incumbrance, and the said company to pay him at the rate aforesaid, as soon as the quantity of land should be precisely ascertained, and a sufficient deed made therefor; and it was thereby further agreed, that the said Bertsch should have the right of the river fishery on the premises, and also the right of using any part of the shore thereby granted, for the abutments of a bridge to be built over the river Lehigh, and also the right of continuing the bridge across the canal, provided the same be so built as not at any time to interfere with the navigation of the canal. And the said company further in fact say, that thereupon afterwards, and after the said canal mentioned in the said agreement, with its necessary appendages and appurtenances were completed, to wit, on 2d December, A. D. 1829, at the county aforesaid, the said company caused all the land belonging to the said Bertsch, so occupied by the said canal improvements, together with all his lands comprised between the said canal and the river Lehigh, to be surveyed, and the quantity thereof to be precisely ascertained, and the quantity was then and there ascertained to be, and was eleven acres and forty-two perches of land, of which the said Christian then and there had notice; and the said company aver, that they have performed, done, and kept everything in the said agreement mentioned on their part and behalf to be done, kept, and performed, and did then and there, to wit, on the same day and year last aforesaid, at the county aforesaid, offer to pay to the said Christian the sum of two hundred and eighty-one dollars fifty-six and one-half cents, the full consideration of said lands, so as aforesaid occupied and agreed to be conveyed, and did then and there demand and require of the said Christian to make to the said company a good and legal title for the same, free from all incumbrance.

“And the said company further aver, that the said lands in the petition and plaint of the said Christian mentioned, and

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therein alleged to be occupied and injured by the said canal, and the said land in the said agreement and in this plea hereinbefore mentioned, are the same and not divers; and this, the said company are ready to verify. Wherefore they pray judgment if the said Christian ought to have instituted the proceedings, or ought to have or maintain his aforesaid action thereof against them, &c."

To this plea the plaintiff replied, "that he did not agree with the defendants for compensation for the injuries complained of in the plaint done to the lands and premises therein mentioned, in manner *and form as the defendants, in their plea [*135] have alleged. And of this he puts himself upon the country."

The written agreement referred to in the defendant's plea, on being offered in evidence, was objected to by the plaintiff's counsel, on grounds which it is not now necessary to state. His Honour permitted the paper to be read in evidence, observing, at the same time, that its effect might depend on future proof.

Abel Abbot, a witness produced by the defendants, being under examination, the plaintiff's counsel put to him the following question: "Could the canal have been laid nearer the river than it is, without altering the level as it stood above and below, without injuring the company?" This question was objected to by the defendant's counsel, but the court permitted it to be answered.

In the course of the trial, the counsel for the plaintiff offered in writing to prove by John Musselman, the following facts:

1st. "That when the article of agreement given in evidence by the plaintiff, was signed, the route of the canal through Christian Bertsch's land was staked off: That it was expressly agreed between the parties that the canal should be dug on the ground staked off: That the plaintiff was unwilling to sign the agreement until it was stipulated that it should be so dug: That it was further expressly stipulated that there should be two locks built on the plaintiff's land, which would have been a benefit to the plaintiff, so as, in a small degree, to compensate him for the injury to be done him, and the situation of the locks was pointed out by Mr. Fell: That Bertsch refused to let the canal be dug further into the land than where the stakes were placed, and said he would sign the agreement on those terms: That the route of the canal was subsequently, and without the assent of Bertsch changed, and laid more than the width of the canal in some places further in upon the land of Bertsch, which was his best land: That the locks have not been built as stipulated for by Mr. Fell, at the time of signing the agreement, and not one is on Bertsch's land: By means of which alterations, much more

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damage has been suffered than would have been suffered had the canal been located where it was originally designed; and that Christian did not then understand, and cannot read English."

The plaintiff then further offered to prove—

2d. "That in the construction of the canal, locks, &c., the defendants occupied a large portion of the farm of the plaintiff, driving through with their carts, carriages, &c., and their superintendents, agents, and workmen working on the same, by which he was deprived of the use of his farm for a whole year; destroyed a large quantity of fence of the plaintiff, on his land; flooded the water on his meadow, by the diversion of three springs mentioned in the declaration, and by increasing the depth of the river, by the dam below the land of the plaintiff; wholly deprived the plaintiff of the profits of his apple-distillery, wool-carding machine, and smith-shop, which, before that time, did a [*136] large business; and took stones from the land of the *plaintiff, for constructing and erecting their slope-wall and locks, for which no compensation has been made."

The evidence thus offered was objected to by the counsel for the defendants, and overruled by his Honour, who, in rejecting it, gave the following

OPINION.—If anything is omitted in an agreement by fraud or mistake, we suffer it to be corrected. This is one thing—to vacate the agreement entirely, is a different matter. To correct an agreement is one thing, to declare it void is another. This latter seldom occurs, unless in case of misrepresentation of material matters. ■

The expression that the agreement cannot be partly in writing and partly by parol, requires much limitation. It is not true as to errors in reducing it to writing. When it is intended actually to make a different contract, by introducing stipulations substantially varying the written agreement, and making it a different contract, not correcting it by adding omissions, the expression is true. The written agreement is to pay for land which should be taken. The parol agreement is to sell a particular designated place. If this were admitted, the agreement would go for nothing.

But, in another point of view, after a contract has been carried into effect, and ruin would follow the rescission of it, as in a contract to pay for flooding land by a mill, and then denying the contract, and by assize of nuisance, pulling it down, courts will, unless there has been much fraud, leave it to be compensated in damages.

If there is no agreement you proceed by petition; if there is an agreement, you must sue on it, and this court has no jurisdiction, unless in a suit on the agreement. It then becomes a

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question, not only as to parol evidence to vary an agreement in a common suit, but one to set aside a contract and give jurisdiction, and, in this case, as the agreement was made, you must sue on it, and recover for a violation of it, if you can. Here we have no jurisdiction to correct it. We have jurisdiction only where no agreement has been made.

In *Christ v. Diffenbach*, 1 Serg. & Rawle, 464, and some other cases, it would not have been heard that a tenant could have been sued as a trespasser, or for use and occupation, and unlimited damages given. Here, if the plaintiff has any claim, it is for a breach of the agreement. By his agreement he had taken his case out of this law. It is one thing to make the defendants pay for half the breadth of the canal, if that could be done; another to set aside the whole contract. *Collam v. Hocker*, 1 Rawle, 108.

This evidence puts an end to the paper; renders it useless, and makes an entirely different contract. As well might it be proved that a bond was not to be paid. The sale of land for a canal seems to preclude all idea of a suit for damages done by it to the distillery, the mill, and in preventing access to the river. You admit an agreement, binding if they had lived up to it. Neither party contemplated choosing arbitrators, an appeal and trial in court for damages done by the canal.

*The plaintiff was nonsuited, and afterwards moved [*137] to take off the nonsuit:

1st. Because the court erred in permitting the question to be put to Abel Abbot, which was objected to by the counsel for the plaintiff as stated above.

2d. Because the court erred in rejecting the evidence proposed to be given by the plaintiff, as contained in his first written offer.

3d. Because the court erred in rejecting the evidence proposed to be given by the plaintiff, as contained in his second written offer.

The Circuit Court having refused to take off the nonsuit, the plaintiff appealed to the court in bank.

On the argument in this court, *Brooke*, for the appellant, abandoned the first of the reasons assigned for taking off the nonsuit.

In reference to the second he observed, that at the time the plaintiff and the president of the Lehigh Coal and Navigation Company, Mr. Fell, were negotiating in reference to the land of the former, he was extremely unwilling to enter into the agreement in question. He was not disposed to take twenty-five dollars an acre, but Mr. Fell, who had been going along the line of the canal, making agreements with the owners of land, told him

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that the line was marked out, and that the company would put two locks on his land, which would have been a great advantage to him, as he contemplated keeping tavern. These representations and promises were the inducement to execute the agreement, but the stipulations of the defendants were not complied with, and consequently the plaintiff was not bound by the agreement. It was an executory contract, depending on certain conditions to be performed, and the parties had a right to alter the terms of it, or if one party departed from it, that party was bound to make compensation to the other. After the plaintiff had executed the agreement on the faith of the assurance of the president, that the canal would be made as it was then staked out, the company departed from the contemplated line, and this the judge who tried the cause would not permit the plaintiff to prove. The mode of proceeding which he adopted was the only remedy open to him to obtain compensation for the injuries he sustained. An action upon the agreement would have afforded no remedy, for he could recover upon it no more than twenty-five dollars an acre for the land, which would have been a very inadequate compensation. Indeed, no action could have been maintained at all. *Hopkins v. Mehaffy*, (11 Serg. & Rawle, 126,) proves that Fell, who was the agent of the company, could not have been made to respond in damages; and as no seal was affixed to the instrument, an action of covenant could not have been maintained against the company. Nor could the plaintiff have brought *assumpsit*, set forth the agreement, and then shown it had been departed from, for that would have been to make the agreement a nullity. Where there is fraud, moral or legal; where a party has been deceived, misled, or mistaken, and the [*138] contract is *virtually destroyed, parol evidence is admissible to prove such facts. Here the agreement was rescinded in consequence of not having been complied with by the defendants, and the proceeding directed by the act of assembly was the only remedy the plaintiff had. The replication was not in the nature of a plea of *non est factum*; it averred that the plaintiff did not agree in the manner and form alleged by the defendants, and the object of the evidence was to establish this averment.

The third reason assigned for taking off the nonsuit was abandoned.

J. M. Porter, for the appellees.—The agreement having been pleaded, it was incumbent on the defendants to prove its execution only, and that the canal was constructed according to that agreement, for the act of 1818 gives no authority to institute such a proceeding as this, except where the parties have been

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unable to agree. To show that the agreement was different from that which was executed by the parties, parol evidence was clearly inadmissible. It was not contended that there was any actual fraud. The rule by which parol evidence is admissible to affect a written instrument is to be restricted, not enlarged. *Iddings v. Iddings*, 7 Serg. & Rawle, 115. Without enlarging it the evidence offered in this case could not have been received. A written agreement cannot be contradicted, added to, or diminished, by parol evidence. *Thomson v. White*, 1 Dallas, 426. Nor can an independent promise, made at the time of executing a written agreement be proved by parol. *O'Harra v. Hall*, 4 Dall. 340; *Heagy v. Umberger*, 10 Serg. & Rawle, 339. A written instrument cannot be explained by parol evidence. *M'Dermott v. United States Ins. Co.*, 3 Serg. & Rawle, 609. Nor is such evidence admissible to vary its contents. *Heilner v. Imbrie*, 6 Serg. & Rawle, 401. It is admissible only to show fraud, mistake, or trust. *Cozens v. Stevenson*, 5 Serg. & Rawle, 421; *Collam v. Hocker*, 1 Rawle, 108. Parol evidence of conversations previous or leading to a written agreement, cannot be received. *Gilpin v. Consequa*, 1 Peters, 85-87; *McKenna v. Doughman*, 1 Penn. Rep. 418. Parol evidence cannot be given of a fact in relation to which there is a written agreement. *M'Kinney v. Leacock*, 1 Serg. & Rawle, 27; *Marshall v. Sprott*, Addison, 361. Where however there has been a parol agreement to alter a water course, it may be proved, provided the agreement has been carried into effect, but not otherwise. *Le Fevre v. Le Fevre*, 4 Serg. & Rawle, 241. A written agreement cannot be controlled, altered, or even explained by parol testimony, except where an ambiguity or uncertainty, arising from some extraneous circumstances, is to be removed. *Richards v. Kellam*, 10 Mass. Rep. 239; *Paine v. M'Intyre*, 1 Mass. Rep. 69; *Reeves v. Leonard*, *Ib.* 91; *Storer v. Freeman*, 6 Mass. Rep. 435; *King v. King*, 7 Mass. Rep. 496; *Albee v. Ward*, 8 Mass. Rep. 83; *Lewis v. Gray*, 1 Mass. Rep. 297; *Townsend v. Weld*, 8 Mass. Rep. 146; *Watson v. Boylson*, 5 Mass. Rep. 411; *Stackpole v. Arnold*, 11 Mass. Rep. 27; *Hunt v. Adams*, 6 Mass. Rep. 519; 7 Mass. Rep. 518; *Barker v. *Prentiss*, 6 Mass. Rep. 430; *Murray v. Hatch*, *Ib.* 477; [**139*] *Flint v. Sheldon*, 13 Mass. Rep. 443; *Davenport v. Mason*, 15 Mass. Rep. 85; *Eveleth v. Cronell*, *Ib.* 367; *Hosey v. Newbold*, 7 Pick. 29; *Church v. Stelson*, 5 Pick. 506. Declarations made at the time of executing a deed cannot be given in evidence for the purpose of showing the intention of the parties, or their understanding of the legal effect of the instrument. *Wade v. Howard*, 6 Pick. 492. A parol agreement respecting a right of way cannot be given in evidence to explain the deed conveying such a right. *Comeloch v. Vandusen*, 5 Pick. 163. He also

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cited *Gay v. Wills*, 7 Pick. 217; *Dix v. Otis*, 5 Pick. 38; 1 *Norris's Peake*, 168 to 194, and notes; 3 *Starkie on Evid.* 995 to 1028. *Irvin v. Turnpike Company*, 2 Penn. Rep. 466.

The opinion of the court was delivered by

KENNEDY, J.—We think that the plaintiff ought to have been permitted to have given the evidence contained in his first offer, so far as it tended to prove that at the time the agreement was made and entered into between the plaintiffs and the defendants, which the latter have pleaded as a bar to this proceeding of the former, the line or route of the canal was then laid out and designated by stakes set up through the plaintiff's land, and that the written agreement which has been set out by the defendants in their plea, was made in reference to that line, and that the land lying between it and the river is the same land that is described in the said agreement; and that the defendants instead of confining themselves to this line as there staked out, in constructing and making the canal, or at least keeping between it and the river, extended the canal beyond the line, and further from the river, into the other land of the plaintiff, and thus cut off a greater quantity of land from the main body of his farm than was agreed on, or embraced in the agreement set out by the defendants in their plea. So far as the plaintiff offered to give evidence to this effect, we think it was admissible, because it cannot properly be considered testimony which would go to contradict, alter, add to, or detract from the written agreement between the parties; but tended to explain the same by giving locality and identity to the subject-matter and applying the contract to it, which is every day's practice. See 13 *Petersdorf's Abr.* 108, note. As often as written agreements fail to describe by metes and bounds the lands contracted for, and to give a precise location to them, the omission is always supplied, and the application of the agreements made to the lands by the introduction of parol evidence, which has ever been considered competent; otherwise, in most cases the agreements could never be carried into effect.

The evidence which the plaintiff offered to give, to show that the defendants agreed to build two locks upon that part of the canal which passes through his land, as a part of the consideration he was to receive for parting with his land to the defendants, was of a different character, and went to establish a very [140] different agreement between the parties from the one reduced to writing and set forth by the defendants in their plea. This evidence we think was properly rejected by the court; for to have received it, would have been in direct violation of that rule so well established, that parol evidence is

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not admissible to contradict, alter, add to, or diminish, a written instrument.

The other testimony offered by the plaintiff, and rejected by the court, was not admissible; some of it because it did not fall within the provisions of the third section of the act to improve the navigation of the river Lehigh, which is the section under which this complaint was originated and must be sustained if at all. It would rather seem to be within the terms of the fourth section of that act; and as to the residue of the evidence rejected, it appears to me that it was not admissible upon any ground of complaint. If the plaintiff did sustain any such damage as he alleged for the introduction of it, I am inclined to think it was *damnum sine injuria*.

As this cause is to go back to the Circuit Court for a new trial, it is proper to notice the opinion which was delivered by that court in respect to the mode of proceeding in this case to which the plaintiff has resorted after having made an agreement with the defendants which they have set forth in their plea. The judge in the Circuit Court was of opinion that this course of proceeding could only be adopted and pursued under the provisions of the act already referred to, where the parties could not agree upon a compensation. In this we think his Honour was right. But we also think that where an agreement has been made between the company and the owner of the land for compensation, as in this case, that if the company should afterwards, without regard to such agreement, go on and make their canal through the land of the owner, on ground contrary to, and different from that which was agreed on, as is alleged, was done here, the owner of the land would thereby be at liberty to rescind the agreement. Besides, it is quite obvious, if what he proposed to give evidence of, be true, that an action brought by him against the company for a breach of their covenant could not afford him adequate redress, because the land occupied by the canal and cut off from the main body of his farm, is not all included and bargained for in the agreement.

If, however, the plaintiff upon the next trial should fail to make sufficient proof to convince the jury that the company violated their agreement in departing from the ground agreed on for the line and course of the canal, he must fail entirely to recover anything in this proceeding. He must then look to his agreement, and be content with the compensation provided for by the terms of it. If it was fairly made, and has been observed and kept on the part of the company, the plaintiff is bound by every principle of honour, law, and justice

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to abide by it on his part, whether it was a bad or a good bargain for him.

The judgment of nonsuit set aside, the cause reinstated, and remanded to the Circuit Court.

Cited by Counsel, 2 Wh. 78; 4 Wh. 415; 5 Wh. 106, 308; 8 W. 146; 10 W. 273; 8 W. & S. 93; 4 Barr, 406; 9 Barr, 220, 326; 1 H. 48; 7 H. 290; 1 C. 226; 6 C. 309; 9 C. 377, 413; 9 S. 60; 24 S. 215; 6 N. 335.

Cited by the Court, 5 C. 97; 2 N. 313, s. c. 3 W. N. C. 383, (where the court allowed parol evidence to be given to show to which of two contemporaneous agreements a guarantee referred;) 7 N. 383.

See next case.

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*[PHILADELPHIA, FEBRUARY 11, 1833.]

Oliver for the use of Rowland *against* Oliver and Another.

IN ERROR.

Parol evidence is admissible to show fraud in the formation of a written instrument, or a fraudulent use of it afterwards.

In the latter case, it is not necessary to have recourse to a writ of deceit; relief may be given in an action of trespass on the case.

ERROR to the District Court for the city and county of *Philadelphia*, in an action of trespass on the case, brought by the plaintiff in error William Oliver for the use of Charles N. S. Rowland, against Oliver & Bell.

The plaintiff's claim, as set out in his declaration, containing thirteen counts, was, that the defendant, in consideration of the plaintiff's assigning to him certain property, assumed to pay to the equitable plaintiff, Rowland, the sum of seven thousand six hundred and one dollars and twenty-five cents, due to him from the nominal plaintiff, Oliver, or, as stated in other counts, to pay that amount to the United States, being the amount of certain bonds for duties on which Rowland was surety for the plaintiff Oliver. The breach assigned, was the non-payment of that sum.

On the trial in the District Court, the plaintiff's counsel, after having given in evidence the written assignment in which no such engagement as that stated in the declaration appeared, offered, for the purpose of showing fraud, to prove by the testimony of the counsel who drew the assignment, was present at its execution, and subscribed it as a witness, that at and immediately before it was executed, the defendants promised the plaintiff to pay the bonds for duties referred to in the declaration, provided the plaintiff would execute the assignment: That by the agreement, and at the instance of the defendants, this en-

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gement was not inserted in the assignment: That it was agreed by them that it should be as binding and available as if it had been inserted in the assignment, and that upon the faith of this engagement the assignment was executed.

This evidence was objected to and overruled by the court.

The plaintiff's counsel then placed the case on the footing of a parol agreement, of which the assignment was only a part execution, and offered to prove, that at the time the agreement was entered into, the plaintiff, Oliver, was indebted to Charles N. S. Rowland on a balance of a book account, besides the liability incurred by Rowland for the plaintiff's accommodation upon the custom-house bonds: That to secure *pro tanto* the balance of the book account, Rowland was to receive an assignment of certain property in New Orleans: That the custom-house bonds were to be absolutely secured at all events: That the plaintiffs refused to transfer the effects mentioned *in [*142] the assignment unless the defendants would accede to these terms: That the defendants acquiesced and promised the plaintiff accordingly to assume the payment of the bonds if he would execute the assignment: That in part execution of this agreement the plaintiff executed and delivered the assignment, and also, on the same day, executed another assignment to Rowland of the property in New Orleans.

This evidence was also objected to and overruled by the court.

Parol evidence was then offered by the plaintiff's counsel to prove fraud on the part of the defendants in procuring the plaintiff, Oliver, to execute the assignment, and that it was even attempted to make a fraudulent use of it to defeat the purpose for which the defendants knew before, and at the time of its execution, it was intended, and in which they then declared their acquiescence. The fraud was proposed to be proved by a chain of evidence calculated to show that before and at the time of the execution of the assignment, the parties, grantors and grantees therein, communicated to the person employed to draw it, their mutual understanding: That in consideration of the intended execution of the assignment in their favour, and as the inducement thereto, the defendants were to assume upon themselves the payment of the bonds of the plaintiff, Oliver, to the United States for duties on goods imported, upon which bonds Charles N. S. Rowland was the surety: That the person thus employed to draw the assignment, recommended to the parties to annex to it a schedule to be therein referred to, comprising a particular account of the debts and engagements which it was proposed to secure by it, including these duty bonds: That the defendants objected to annexing such a schedule, alleging it would hurt their credit, but at the same time promised

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the plaintiff that if he would execute the assignment without such a schedule they would pay the bonds as if there was a stipulation to that effect incorporated in the assignment: That this promise was repeated at the time the assignment was executed: That by means thereof the plaintiff was induced to execute it, and the defendants thereupon took possession of the estate and effects therein mentioned: That after the assignment in the month of June, 1806, both the defendants in writing, and also jointly and severally by word of mouth, to different persons, on several occasions, admitted their liability for the full amount of the duty bonds in question; stated that they were under an obligation to pay them, and also, that they were fully secured by the property assigned to them: That by assuring their creditors they were under the necessity of paying these bonds, they persuaded them to make favourable compromises of their debts, and thus succeeded in compromising upwards of ninety thousand dollars of their engagements for less than sixty thousand dollars: That Rowland took up the bonds in question upon which he was surety, as they fell due, at New York, and paid them off to the amount of seven thousand six hundred and one dollars and twenty-five cents, and that he communicated this to the defendants, who then refused to comply with *their engagement, [*143] or to indemnify him in any manner for what he had been thus compelled to pay on the plaintiff Oliver's account.

To this evidence the defendant's counsel also objected, and it was overruled by the court. A bill of exceptions was taken to each of the decisions above stated.

Evidence of a similar nature, but in a different form, was subsequently offered, objected to and overruled, on which two more bills of exceptions were taken.

The jury, under the direction of the court, found a verdict for the defendants, on which a judgment was entered in their favour, and a writ of error was taken out by the plaintiff.

Cadwalader and Randall, for the plaintiff in error, cited 2 Evans's Pothier, sec. 3, app. 16, p. 150; Starkie on Evid. Pt. 4, pp. 1048, 1049; *Lyon v. The Huntingdon Bank*, 14 Serg. & Rawle, 283; *M'Culloch v. Girard*, 4 Wash. C. C. Rep. 289; 22 Vin. Ab. 216, pl. 1, 2, 3; *Ib.* 218, pl. 11, 14; 1 Rep. 176, a, note; *Hayden v. Mentzer*, 10 Serg. & Rawle, 333; *Packer v. Hook*, 16 Serg. & Rawle, 327; 17 Mass. Rep. 122, 257; Com. Dig. Action on Case, Asst. B. 3; *Overton v. Tracey*, 14 Serg. & Rawle, 324, 325; 1 Rolle's Ab. 8, 95; 1 Vin. Ab. 271, pl. 3; *Ib.* 279, 280, pl. 4, 5; *Peterson v. Willing*, 3 Dall. 506, 508; *Drum v. The Lessee of Simpson*, 6 Binn. 478; *O'Hara v. Hall*, 4 Dall. 340; *Miller v. Henderson*, 10 Serg. & Rawle 292; *Hill*

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v. Miller, 5 Serg. & Rawle, 355; *Hamilton v. Asslin*, 14 Serg. & Rawle, 449; *Hultz v. Wright*, 16 Serg. & Rawle, 346; *Christ v. Diffenbach*, 1 Serg. & Rawle, 464, 466; *Campbell v. M'Clenachan*, 6 Serg. & Rawle, 171; *Frederick v. Campbell*, 14 Serg. & Rawle, 293, 295; *Wallace v. Baker*, 1 Binn. 616; *Lessee of Drinkle v. Marshall*, 3 Binn. 587; *Lessee of Thomson v. White*, 1 Dall. 424, 428.

J. R. Ingersoll and Chauncey, for the defendants in error, cited *The Commonwealth v. Brenneman*, 1 Rawle, 315; 8 Wheat. 195; *Heagy v. Umberger*, 10 Serg. & Rawle, 341; 3 Starkie on Evidence, 995, 1009; *Hopk.* 124; *Schemerhorn v. Vanderheyden*, 1 Johns. Rep. 140; *Maigley v. Hauer*, 7 Johns. Rep. 341; *Howes v. Barker*, 3 Johns. Rep. 509; 12 Johns. Rep. 490; *Plankinhorn v. Cave*, 2 Yeates, 370; *Christine v. Whitehill*, 16 Serg. & Rawle, 110; 2 Johns. Ch. R. 415; 1 Johns. Ch. R. 429; 1 Mass. Rep. 69; 8 Mass. Rep. 146; 10 Mass. Rep. 244; 1 Bay, 307; 1 Root, 253; 6 Conn. Rep. 85; 10 Johns. Rep. 230; *Phill. Ev.* 422; 2 Johns. Ch. R. 557.

The opinion of the court was delivered by

ROGERS, J.—It is, doubtless, a general principle of law, that parol evidence shall not be admitted to destroy, control, add to, or alter a written instrument, but the exceptions to the rule are equally well settled. Ever since the case of *Hurst v. Kirkbride*, cited in 1 Binn. 616, it has been the practice to receive parol evidence of *what passed at the time of the execution of deeds, or at and before the execution. When the [¹⁴⁴] fairness of the transaction is impeached, it is immaterial whether the party intended a fraud, at the time of the contract, or whether the fraud consists in the fraudulent use of the instrument. *Hurst v. Kirkbride*; *Hultz v. Wright*, 16 Serg. & Rawle, 345; *Lyon v. Huntingdon Bank*, 14 Serg. & Rawle, 283; *Thomson v. White*, 1 Dall. 424, are of this description. In *Thomson v. White*, the fraud consisted in Lawrence Saltar obtaining a conveyance of his wife's estate under a solemn promise to make a settlement, which he afterwards neglected to do. It has never been doubted that he entered into the contract with good faith. In his last sickness, he expressed uneasiness at leaving no will, because, as had always been supposed, he thereby intended to comply with his promise. The fraud consisted in the fraudulent use which was attempted to be made of the deed, in the exclusion under the general rule of law, of Mary Thomson, the sister of Mr. Saltar, and to whom Lawrence Saltar promised to assure the property. "As to fraud," says Justice Tod, who delivered the opinion of the court in

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Hultz v. Wright, "it is not supposed to be necessary to have proof express that a writing has been obtained fraudulently, in order to admit parol evidence against it, on that score; but parol evidence may be admitted to resist the fraudulent use of a writing in the obtaining of which no fraud can be made to appear." That was a case where, in debt for rent, parol evidence was admitted to show that in making a lease for nine years, rendering rent, it was understood and agreed by all parties that for the last nine months no rent should be payable. So also in an action on a single bill, the defendant, under the plea of payment, is permitted to prove that the bill was taken subject to a parol agreement, made long before its date. *Lyon v. Huntingdon Bank*, 14 Serg. & Rawle, 283. In *Robinson v. Eldridge*, 10 Serg. & Rawle, 142, as well as in the case just cited, the defence consisted of a number of facts, which took place at different times, and which all tended to make one whole. It is difficult to discover any difference between the evidence offered and the evidence which was received in *Campbell v. M'Clenachan*, 6 Serg. & Rawle, 172. Parol evidence was given of what passed between the parties at and immediately before the execution, when the plaintiff was induced to execute the articles of agreement, by the defendant's promises. The case of *Campbell v. M'Clenachan* was an action on the case, on a parol contract, in which the defendant promised the plaintiff to permit him to take as much timber from the land purchased by the defendant from the plaintiff, as would be sufficient to build a boat to go down the Ohio. The same defence, as has been urged here, was then taken, but without avail. As is justly observed, to refuse performance of a verbal promise, after having made use of it, to get the plaintiff's signature to the agreement, is a trick, of which the law will not permit the defendant to avail himself. If we are to take what the plaintiff offers to prove to be true, [*145] what are we to think of the defendants' *conduct? Surely every person must see they are attempting to avail themselves of the legal advantages, at the expense of every principle of honour and honesty. It may be a difficult matter in some cases to prevent the fraudulent use of an instrument, except through the medium of parol evidence. For the same principle I also cite 1 *Ld. Raym.* 464; *Christ v. Dffenbach*, 1 Serg. & Rawle, 464; *Lessee of Dinkle v. Marshall*, 3 Binn. 587.

I do not feel myself at liberty to reason on the policy of the rule, or the exceptions to it. It is sufficient for me, that the point has been settled by a train of authorities, which it is now too late to overturn.

Nor is this case in opposition to *Heagy v. Umberger*, 10
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Serg. & Rawle, 339. There the plaintiff sold to the defendant a horse, in consideration of which he received from him an assignment of a single bill, expressly to be taken at his own risk. The evidence was in direct opposition to the writing, and fraud was not alleged. Had there been fraud, a different case would have been presented, for fraud forms an exception to all rules. It is to prevent fraud, and the injustice which would arise from mistake, that Courts of Equity have relaxed the general rule. Fraud, accident, and mistake, are the great heads of equity jurisdiction, and without the power to receive parol evidence, it is not perceived how, in a great majority of cases, equity could administer relief. Where they have a court of equity, no evil has been felt from this power, and in Pennsylvania, where equity is administered by the court, through the medium of the jury, none will arise under the control which the court must necessarily exercise over cases of this kind.

In the Lessee of Dinkle v. Marshall, parol evidence was admitted in contradiction of the deed, expressly on the ground of fraud.

It is no answer to say, that the parol evidence is in opposition to the deed, for where there is fraud, or the party attempts to make a fraudulent use of an instrument, contrary to his contract, parol evidence is admitted to prevent injustice. In all cases of fraud, or plain mistake in a writing, as equity will relieve on parol proof, so will our courts through the medium of a jury.

The cases already cited also show, that relief has been given in this form of action, and that it is unnecessary to resort to action of deceit.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 2 Wh. 78; 3 W. 184; 7 W. & S. 255; 5 Barr. 226; 10 Barr. 282; 1 H. 47; 7 H. 290; 2 G. 148; 3 G. 55; 5 S. 107; 8 S. 487; 28 S. 472; 30 S. 404; 4 N. 374; 13 N. 416, s. c. 9 W. N. C. 456; 1 W. N. C. 599.

Cited by the Court, 1 J. 240.

In 4 W. & S. 149, Mr. Justice ROGERS decided that the mere breach of a parol agreement was not such a fraud as would raise a trust, without referring to his opinion in this case. But in 24 S. 314, 315, the cases are discussed, and Oliver v. Oliver, and Thomson v. White, 1 D. 424, said to be still good law.

See preceding case as to admission of parol evidence to contradict a writing

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*[PHILADELPHIA, FEBRUARY, 1833.]

Brown *against* Johnson.

IN ERROR.

On a judgment in an action of covenant by the grantee of a rent charge against the grantor, the whole of the lot out of which it issues may be taken in execution, although a part of it has been sold, *bona fide*, by the grantor, subsequently to the creation of the rent charge, and the vendee of such part has not been made a party to the action as terre tenant.

ON a writ of error to the District Court for the city and county of *Philadelphia*, it appears that this was an ejectment for a lot of ground in the city of Philadelphia, brought by the defendant in error, Eckles Johnson, against the plaintiff in error, Edith Brown.

On the first day of January, 1799, Charles Hurst granted to David Eakin, his heirs and assigns, a lot of ground on Hurst street, in the city of Philadelphia, containing in front twenty-two feet, and in depth ninety feet, to Gillis's alley, reserving thereout a rent charge of twenty-nine dollars and one-third of a dollar payable to himself, his heirs and assigns.

On the sixteenth of April, 1806, David Eakin conveyed to Pompey Boon, his heirs and assigns, the front part of the lot, containing twenty-two feet on Hurst street, and in depth forty feet, reserving thereout to himself, his heirs and assigns, a rent charge of twenty-nine dollars and one-third of a dollar, it being understood and agreed, however, that all the payments which should be made by the said Pompey Boon to the person to whom the original rent charge should be payable, should be considered as paid to the said David.

Pompey Boon died, and his widow, the defendant below, with his children, asserted title to that part of the lot of which had been conveyed to him subject to the said rent charge, which by sundry mesne conveyances became vested in Rebecca Robins, who instituted an action of covenant against Hannah Eakin, the executrix of David Eakin, to recover the arrearages of the rent, and judgment was entered by consent on the 29th of November, 1821, in favour of the plaintiff. A *feri facias* issued on this judgment, and was levied on the entire lot; and on a *venditioni exponas* subsequently issued, Isaiah Eakin became the purchaser, and received from the sheriff a deed for the whole of the premises. On a subsequent judgment obtained by John Wilson against Isaiah Eakin, the premises were again exposed to public sale and purchased by the present plaintiff.

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On the trial of the issue in the District Court, a special verdict was found, setting forth the facts above stated, on which the court, after hearing counsel, gave judgment for the plaintiff.

The following errors were assigned in this court :

*The judges of the District Court erred in ordering judgment to be entered for the plaintiff on the special [*147] verdict found by the jury—

1st. Because they have thereby decided that a judgment obtained in an action against *A.*, will bind land of *B.*, a stranger to the action.

2d. Because they have thereby decided, that a judgment obtained against the executor of a grantor of a ground rent on the covenants contained in the deed, shall bind lands *bona fide* sold and assigned long before the action of covenant was brought, and to which action the assignee was neither a party nor privy.

Hopkins for the plaintiff in error, cited 2 Tidd's Pr. 963; 2 Ra. Ab. 72, 93; 3 Com. 271.

Newcombe for the defendant in error, cited *Bentleon v. Smith*, 2 Binn. 146; *Nace v. Hollenbach*, 1 Serg. & Rawle, 540.

The opinion of the court was delivered by

GIBSON, C. J.—The plaintiff claims as a purchaser at a sheriff's sale under a judgment on a covenant to secure the payment of a rent charge, and the defendant claims a part of the premises as a purchaser from the covenantor. The deed by which the charge was created, contains not only a covenant to pay, but the usual clauses of distress and re-entry; so that the premises were clearly chargeable in a proceeding directly against them, and the principal question is, whether the same effect may be produced by proceeding against the person. Whatever may be the common law incidents peculiar to the mode of proceeding where there are distinct remedies against the person and the land, it is certain that we have attached them rather to the right than the remedy. Thus in *McCall v. Lenox*, 9 Serg. & Rawle, 302, the lien of a judgment on a bond and warrant accompanied with a mortgage, was carried back to the date of the latter, so as to exclude the title of a lessee of the mortgagor prior to the judgment but subsequent to the mortgage; yet the lien of a judgment, as such, is commensurate with but the period of its actual entry. But in *Bentleon v. Smith*, 2 Binney, 151, the point before us was directly ruled, the plaintiff being suffered to take out of court the amount of his judgment on the

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covenant, in preference to prior judgment creditors: and this could be done only by subjecting the premises to the charge of the quit-rent as a lien, without regard to the nature of the proceeding against the person as a remedy. In the case before us, therefore, the ground landlord was entitled to have execution of the premises in the hands even of an alienee. But it is said this could not be done without making the latter a party as a terre tenant, to the action against his alienor. A terre tenant is, however, not necessarily entitled to notice, as was determined in *Young v. Taylor*, 2 Binney, 228: in fact, his estate may be sold wherever the judgment creditor may proceed to execution without a *scire facias*. These premises therefore, passed by the sheriff's sale, and were recoverable on the case stated.

Judgment affirmed.

Cited by Counsel, 8 W. & S. 381; 2 Barr, 265; 3 H. 263; 9 C. 438; 11 C. 125; 3 Wr. 42; 11 Wr. 216; 2 S. 297; 10 W. N. C. 44.

Cited by the Court, 2 W. & S. 305, and approved in 1 H. 20.

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*[PHILADELPHIA, FEBRUARY 11, 1833.]

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APPEAL.

There is a distinction between the liabilities of executors with respect to creditors, and those with respect to legatees; and there are many cases in which they would be discharged as against the latter, though not against the former.

So long as executors manage the estate of their testator in accordance with the ideas which he himself entertained of it, and do nothing but what there is reason to believe he would have approved, could he have been consulted, it seems they are not responsible for losses as respects legatees; *aliter*, as respects creditors.

Testator made a will of which he appointed his three sons, A., B., and C., executors, and directed that two of his sons A. and B., should put out to interest for the use of his daughter R., two thousand six hundred and sixty-seven dollars of his estate, "on land security, or otherwise render it safe and productive, and pay the proceeds thereof to her from time to time, as they in their wisdom should judge most for her benefit." Among the assets which came into the hands of the executors, was a bond given to the testator by G. S. and his father J. S., in which the latter was surety. The bond was dated in the year 1810. In 1813, at a meeting of the creditors of G. S. an offer was made to the testator to pay off the bond, which he declined, saying he did not wish it paid during his life; he only wanted the interest. He continued to receive the interest until his death in 1816. J. S. the surety in the bond, died, in 1818, leaving a large estate. A suit was afterwards brought against his executors to recover the amount of the bond, but it was adjudged to be a joint and not a several bond, and that therefore there could be no recovery against the estate of J. S. as G. S. had survived him. G. S. became insolvent about the year 1817, and the money was lost. There was some evidence to

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show, that about a year after the death of the testator, one of the legatees offered to take the bond as part of her share of the estate, which A., one of the executors, would not agree to, intimating that he wished to retain it as a part of the fund to be set apart for the use of the testator's daughter R. It also appeared that G. S. in the year 1820, offered to A., one of the executors in satisfaction of the bond in question, a bond and mortgage on certain lands in Steuben county, New York, but it was not shown what was his title to the lands, nor what was their value, and the offer was refused. The executors appeared to have acted with good faith throughout the whole business, and in the suits instituted on the bond in controversy, acted under the advice of eminent counsel. Held, that under the particular circumstances of the case, of which the above are the principal, they were not responsible to legatees for the loss of the bond, and that they were entitled to credit for the expense they incurred in endeavoring to collect it.

THIS case came before the court on an appeal from the decision of the Circuit Court of *Montgomery* county, held by the Chief Justice in March, 1832, reversing the decree of the Orphans' Court of that county on the settlement of the accounts of the executors of Samuel M'Nair, deceased.

Samuel M'Nair died in the year 1816, leaving a will, which bore date the 15th of April, 1816, and was proved on the 16th of May, following.

By this will, after certain legacies and devises which need not be mentioned, and giving to his wife an estate for life in a portion of his real estate, he directed his two sons, John M'Nair and Samuel M'Nair, or the survivor of them, to take, receive, and hold out of his personal estate, two thousand six hundred and sixty-seven dollars (if so much should remain after payment of debts, funeral expenses, *and legacies), and to put [*149] the same to interest on land security, or otherwise render it safe and productive, and pay the interest thereof from time to time (as they in their wisdom should judge most for her benefit) to his daughter Rebecca M'Nair, and if there should not be a sufficiency of personal estate for that purpose, he directed that his said two sons should put to interest whatever sum might be derived from that source, and do with it in all respects as before directed; and he further directed, that at the decease of his wife, his executors, or the survivors or survivor of them, should sell at public sale the sixty-one acres devised to her, and out of the price thereof make up the deficiency, so that from and after that time, Rebecca should receive the interest of the whole sum of two thousand six hundred and sixty-seven dollars, in the manner, and under the restrictions aforesaid, (except a deduction of reasonable commissions to his two sons John and Samuel for their trouble,) during her natural life, and that after her decease, the said sum of two thousand six hundred and sixty-seven dollars, should be paid to his two daughters, Ann Craven and Mary Long, in equal shares.

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Of this will the testator appointed his three sons, John, Samuel, and James M'Nair, executors.

On the 2d of July, 1827, the executors settled an account in the register's office, from which it appeared, that the personal estate of the testator amounted to seven thousand three hundred and eighty-eight dollars and eighty-six cents, and the proceeds of his real estate, to the sum of eleven thousand one hundred and forty-six dollars and twenty-five cents, making a total of eighteen thousand five hundred and thirty-five dollars and eleven cents, and after deducting the credits taken by them including commissions at five per cent. on four thousand seven hundred and twenty-one dollars and eighty-six cents, "the amount actually received of the personal estate," and at two and a half per cent. on the proceeds of the real estate, there remained a balance in their hands of fourteen thousand and thirty dollars and seventy cents.

This balance they account for by taking credit

1st, For the amount of a bond charged in the inventory as due from George S. Shelmire, now at issue in the Supreme Court,	\$1,382 70
2d, For the balance of a bond due from the estate of James Allison, not proceeded in by the consent of the legatees,	186 67
3d, For the amount bequeathed in trust for Rebecca M'Nair,	2,667 00
4th, For the bonds of Hugh Long and Ann Craven, for the purchase-money of the real estate,	11,146 25
	<hr/>
	<u>\$15,382 62</u>

[*150] *The account thus settled was referred to auditors, who reduced the commissions charged on the proceeds of the real estate to one per cent.; disallowed some other credits claimed by the executors, and found a balance in their hands of fourteen thousand two hundred and eighty-four dollars and thirty-three cents, which they reported had been duly accounted for in the manner above stated.

Exceptions were filed to this report by Hugh Long, the husband of one of the legatees named in the will, of which the following only are now material, viz. :

1st, The auditors have stated that the executors have accounted for the balance found in favour of the estate by the amount of a bond charged in the inventory as due from George

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S. Shelmire, now at issue in the Supreme Court, for one thousand three hundred and eighty-two dollars and seventy cents, while in fact there is no such bond in the inventory; but the auditors are supposed to intend a certain bond mentioned in the inventory given by John Shelmire and George S. Shelmire to the deceased, conditioned for the payment of one thousand three hundred dollars with interest due thereon at the time of the decedent's death, amounting to eighty-two dollars and seventy cents, no part of which bond or interest has been accounted for, inasmuch as the accountants have already received the said sum of eighty-two dollars and seventy cents and not accounted for it, and therefore cannot recover it in the suit alluded to, and as to the principal of the said bond, they are not entitled to any credit for it in this account, nor can they at any time hereafter be entitled to any credit for it as executors, inasmuch as the said John and Samuel M'Nair took the bond upon themselves as trustees of Rebecca M'Nair under the will for her use, and refused to collect it, or to deliver it to the legatees for collection.

2. The auditors have allowed the executors credit for expenses in endeavouring to collect the said bond, incurred after the said John and Samuel M'Nair, as trustees of Rebecca M'Nair had taken it upon themselves for her use.

Exceptions were also filed by the executors to so much of the auditor's report as disallowed commissions on that part of the personal estate which was set apart for the trustees of Rebecca M'Nair, and reduced the commissions on the proceeds of the real estate from two and a half to one per cent.

The bond which was the subject of dispute between the parties bore date the 2d April, 1810, and was executed by George S. Shelmire as principal debtor, and John Shelmire as surety, to Samuel M'Nair, in the penal sum of two thousand six hundred dollars, conditioned for the payment of thirteen hundred dollars. In the obligatory part the bond was joint, but the condition provided, that if the said George S. Shelmire and John Shelmire "or either of them, their heirs, executors, administrators, or any one of them, shall and do well and truly pay," &c., then the bond to be void.

*From the evidence exhibited to the Orphans' Court it appeared, that in the year 1817, George S. Shelmire [*151] was in embarrassed circumstances, and removed to the western part of the state of New York. John Shelmire died on the 6th of April, 1818. To November Term, 1818, a suit was brought upon the bond above referred to, by the executors of Samuel M'Nair, against the executors of John Shelmire, in the Court of Common Pleas of Bucks county, in which a nonsuit was after-

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wards entered. In the management of this suit, the plaintiffs acted under the advice of eminent counsel, who were of opinion that the bond was joint and several, and that a recovery on it might be had from the estate of John Shelmire.

To August Term, 1822, the executors of Samuel M'Nair brought suit on the bond against George S. Shelmire in the Court of Common Pleas of Ontario county in the state of New York, in which they obtained judgment, and issued a *fiery facias* and *ca. sa.* against him, which were returned respectively *nulla bona*, and *non est inventus*.

In the year 1824, George S. Shelmire was discharged under the insolvent laws of the state of New York.

To April Term, 1825, the executors of Samuel M'Nair brought another suit on the bond against the executors of John Shelmire, in the Court of Common Pleas of Bucks county. The cause was removed to the Circuit Court of that county, where it was tried on the 12th of February, 1828, before Judge Huston, who having instructed the jury that the bond was joint, and not joint and several, they found a verdict for the defendants. The case was tried for the plaintiffs by eminent counsel, but no appeal was taken from the judgment of the Circuit Court.

Preparatory to the hearing before the Orphans' Court, the depositions of several witnesses were taken, from which it appeared, that in the year 1813, Samuel M'Nair, the testator, and the other creditors of George S. Shelmire, met at the house of the latter for the purpose of receiving their debts. Samuel M'Nair declined receiving his, declaring that he did not wish it paid during his life; the interest was all he required. Shortly after the death of John Shelmire, James M'Nair, one of the executors of Samuel M'Nair, called on the Rev. Mr. Montayne, who was one of the executors of John Shelmire, and was examined as a witness in this cause, and gave him notice of the bond in question. Mr. Montayne asked him if he had called on his testator in his lifetime, to which M'Nair answered, that he had not. Montayne then inquired, whether the interest had been paid up, and by whom? M'Nair replied, that the interest had been paid up to 1817, by George S. Shelmire. Mr. Montayne then asked him, why they had not collected the principal, adding, that there had been a lapse of almost two years between the death of Samuel M'Nair and that of John Shelmire; that George S. Shelmire had been able to pay the bond at any time within a year after the death of Samuel M'Nair, and that he (Montayne) did not hold himself accountable; but, nevertheless, if they would pursue *George S. Shelmire, and

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the bond. M'Nair replied, that he had nothing to do with George S. Shelshire.

Mr. Montayne, in the course of his examination, stated, that at a meeting of the auditors at Willow Grove, he heard Samuel Hart (who was the attorney in fact of Ann Craven) or Hugh Long, say, that they had been willing, at the time the meeting took place, to distribute the legacies, to receive the bond in question, and that he understood, at the audit, from all the parties, that there had been a time when the legatees were willing to receive the bond, but the executors would not give it to them. Another witness stated, that at this audit, the executors admitted that they had received two years interest on the bond after the death of Samuel M'Nair, and also admitted that the legatees had offered, about one year after death of Samuel M'Nair, to take the Shelshire bond as part of their share of the estate. The reason given by John M'Nair for retaining the bond was, that he had money on hand of which he would lose the interest, if he did not pay it to his sister, Ann Craven. Samuel and James M'Nair agreed that Ann Craven should have the bond at that time, but John objected, and said they would keep it; it was a good bond. One of the auditors who was examined in reference to what took place before them, testified, that he understood that the executors refused to give the bond to the legatees, because they were not indemnified. To another witness, John M'Nair said, in a conversation which took place in the year 1817 or 1818, that he considered the bond good, and had not a mind to part with it; he allowed Squire Shelshire's property was able for it.

From the evidence of Mr. Montayne it appeared, that George S. Shelshire was entitled, as one of the heirs of his father, to one-eighth of eighty-nine acres and twenty-nine perches of land, worth about fifty dollars an acre. He had received about twelve hundred dollars in his father's lifetime and would be entitled to about six hundred and fifty dollars more, provided the land brought fifty dollars an acre.

He assigned his interest in his father's estate to James Vansant, to secure a debt of one thousand and forty dollars due to him from George S. and John Shelshire, for which the latter was surety. This assignment was exhibited to Mr. Montayne, who afterwards received notice from the executors of Samuel M'Nair not to pay over the money to Vansant. This he agreed to provided they would save him harmless, which they refused to do. He was afterwards served with a foreign attachment in which the executors of Samuel M'Nair were plaintiffs.

In the years 1814, 1815, 1816, and during part of 1817, George S. Shelshire was doing a large business in Philadelphia.

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He became embarrassed in 1817, and went to reside in the state of New York. In the year 1820, he offered to John M'Nair, in satisfaction of the Shel mire bond, a bond and mortgage on lands in Steuben county, in the state of New York, which he alleged [*153] he held in company with *William Folwell, and exhibited certificates to show that the land was clear of incumbrances. John M'Nair declined the offer on the ground that the land was too distant, and he did not know the value of it.

The auditors to whom the accounts were referred, were satisfied that all proper exertions had been made by the executors to collect the bond, and under this belief and a conviction of the insolvency of George S. Shel mire, they gave them credit for the amount of the bond with the interest due upon it, and also for the expenses incurred in endeavouring to collect it.

On the 29th of May, 1828, the Orphans' Court made a decree, disallowing the credit of one thousand three hundred and eighty-two dollars and seventy cents, given by the auditors to the executors, being the amount of the Shel mire bond with interest, and also the expenses incurred in endeavouring to collect it, amounting to one hundred and seventy-six dollars and eleven cents, on the ground that they had been incurred after the executors had taken it upon themselves, and refused to give it to the legatees, to be collected at their own expense.

The account was then referred to another auditor by whom it was corrected and restated in conformity with the decision of the court, and a final decree made confirming the report of the auditor.

From this decree the executors of Samuel M'Nair appealed to the Circuit Court, where the following exceptions were filed to the decree of the Orphans' Court :

1. The Orphans' Court erred in refusing to allow the executors credit for one thousand three hundred and eighty-two dollars and seventy cents, the principal and interest of the bond of George S. Shel mire and John Shel mire, which they were unable to recover.

2. The Orphans' Court erred in refusing to allow them credit for the money expended in the effort to collect the said bond.

3. The Orphans' Court erred in allowing the executors commissions on only four thousand seven hundred and twenty-one dollars and eighty-six cents, instead of five thousand eight hundred and nineteen dollars and forty-two cents, the amount of personal estate actually received by them.

4. The Orphans' Court erred in allowing the executors a commission of one per cent. only on the proceeds of the real estate, instead of a commission of two and a half per cent

The Circuit Court reversed the decree of the Orphans' Court

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as to the first and second exceptions, and affirmed it as to the rest. An appeal was then taken to the Supreme Court on behalf of Ann Craven and Hugh Long.

Kittera for the appellants, cited Gordon's Law of Decedents, 264; 2 Br. Ch. Rep. 156; 1 Chitty's Eq. Dig. 401; 5 Ves. 844; 6 Madd. 13.

**Rawle, Jr.*, for the appellees, cited *Konigmacher v. Kimmel*, 1 Penn. Rep. 207; *King v. Morrison*, Ib. [*154] 188; *Bonsall's Appeal*, 1 Rawle, 266; *Osgood v. Franklin*, 2 John. Ch. Rep. 80; *Thompson v. Brown*, 4 John. Ch. Rep. 619, 626, 627; 1 Hopk. Ch. Rep. 233; *Geddis v. Hawk*, 10 Serg. & Rawle, 33; *Besore v. Potter*, 12 Serg. & Rawle, 154; *Bishop v. Church*, 2 Ves. 101, 371; *Weaver v. Shryork*, 6 Serg. & Rawle, 265, 266; *Moser v. Libenguth*, 2 Rawle, 428.

The opinion of the court was delivered by

KENNEDY, J.—It is proper to observe, that the contest in this case is between the executors and legatees, and not with the creditors of the testator. And although Lord Thurlow, in *Sadler v. Hobbs*, 2 Bro. Ch. Rep. 117, seemed to think it an odd distinction that a creditor should have a right to charge an executor when legatees should not, and Mr. Toller, in his treatise on the Law of Executors and Administrators, 484, has said, that it appeared to rest on no authority, its existence is recognised in 2 Foub. 83–84, and acted upon in several cases. In *Gibbs v. Herring*, Pre. Ch. 49, the distinction is taken, and the decision of the case professes to be founded upon it. The court say, “the executrix shall not make it good to the plaintiffs who were to have a share of the estate by the custom of the province of York, but against a creditor she should.” In *Churchill v. Lady Hobson*, 1 P. Wms. 243, the distinction is expressly taken by Lord Chancellor Harcourt, and given by him as the reason and ground of his decision in that case. Lord Northington in *Westley v. Clark*, 1 Eden, 357, s. c. in note in 1 P. Wms., 83, if he does not sustain the distinction, decided that two executors who joined a third in giving a receipt for money received by him alone, should not be liable to the legatees for it, which is directly contrary to what Lord Thurlow considered was the rule as to executors. And in *Bacon v. Bacon*, 5 Ves. 331, an executor who lived in town gave twelve hundred pounds to his co-executor to pay a list of debts made out and represented by the co-executor to be owing by the testator in the country, where he resided at the time of his death, was discharged from a loss of more than four hundred pounds of the money, arising from the

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misapplication and insolvency of the co-executor. It appeared there, that the co-executor lived in the country, where he said the debts were owing, and where in fact debts of considerable amount were known to exist by the executor giving the money; that the co-executor had been the confidential agent and attorney of the testator in his lifetime for many years, and had been intrusted with the receipt and payment of large sums of money by him. And as a direct and binding authority upon this court, we have the decision of it made as early as 1788, in the case of *Brown's Appeal*, 1 Dall. 311, where one executor, who had received money belonging to the estate of the testator, and paid it [*155] over to his co-executor, who became insolvent, *was held not to be answerable to legatees, although, as the court say, he would have been chargeable to creditors, if there had been any.

In the case of *Gibbs v. Herring*, it appeared that the testator in his lifetime had intrusted J. S. with several sums of money, to dispose of at interest for him, and died while part of it was still in his hands undisposed of. The executrix, however, instead of taking the money out of the hands of J. S., directed him to put it out at interest, which he accordingly did, on security that proved deficient, and yet she was held not liable for the loss of it to the legatees. The resemblance of this case to the one under consideration is, as it appears to me, very striking. The confidence of the testator in the goodness of his security for the debt due upon the bond, with the accruing interest, shown in the one case by his refusing to receive the principal, saying he "did not wish it paid during his life, the interest was all that he required," is fully equivalent to the confidence of the testator evinced in the other case, in the integrity and responsibility of J. S., by intrusting and leaving his money in his hands to be put to interest on such security as he might think good. Beside, executors have always been permitted to exercise their discretion upon such subjects; for Lord-keeper Harcourt in *Brown v. Litton*, 1 P. Wms. 141, lays it down, that where an executor puts out money, though without the indemnity of a decree, upon a real security which there was no reason for them to suspect, but afterwards such security proves bad, he is not accountable for the loss.

Lord Redesdale, who was disposed to hold a pretty tight rein upon executors, was unwilling to lay down the rule positively that there was no case where the strictness of the law would charge a man as executor as to creditors, in which a court of equity would not charge him also as to legatees. "Legatees," he said, "were bound by the terms of the will; creditors were not so; and therefore in many cases executors would be dis-

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charged as against legatees, though not as against creditors." 2 Schoales & Lef. 239.

An opinion seems to have prevailed at one time, and perhaps, with some at almost all times, that it was an inflexible rule to charge executors jointly with all moneys for which they had given joint receipts, upon the ground, that it was unnecessary for them to join in such receipts unless they intended that they should be charged jointly, that is, to be responsible for each other; but in the case of trustees, the one who actually received the money was alone to be charged, although all had joined in giving the receipt, because it was necessary that all should unite in the execution of the trust where it was joint. Lord Eldon thought this a very intelligible rule, but admits that it had been broken down by decisions, in which the rule that every case was to be determined upon its own circumstances, was adopted; whether it was wise to do so, he however thought might be reasonably doubted. 16 Ves. 479.

Here we have the admission of an advocate of this first rule, as he seemed to think it was, that its inflexibility no longer exists, but *has yielded to another rule, that every case [*156] must be decided upon its own peculiar circumstances. Indeed it may perhaps be somewhat doubtful which of these rules was first established, for *Gibbs v. Herring*, in which the latter is adopted and applied, is one of the earliest reported cases that we have on this subject. The former is undoubtedly, as Lord Eldon observes, a very intelligible rule, and one too that would probably in most cases be of easy application, but the reasonableness of it may be very questionable. I confess that I am unable to persuade myself that the reason assigned for making executors responsible for moneys which they never received, merely because they joined with a co-executor who had received it, in signing a receipt, is in any way sufficient, or that it is true in point of fact. I do not believe that in doing so, they ever think of making themselves answerable for the money where it has been received by their co-executor. On the contrary, I believe that it is done, either because they conceive it to be their duty to do so, as in the case of joint trustees, or do it from a desire to satisfy the payer of the money, who may not think he has got a good acquittance or discharge from his obligation unless signed by all the executors. I do not mean to say, that any one who is a lawyer could ever have thought so, but then it must be recollected that every one who has to pay money to executors is not a lawyer, nor is every executor himself one; and it must also be observed that it is not very easy to discriminate between the office of an executor and the office of an administrator, and yet there was a time when lawyers, and judges too, thought it

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necessary that co-administrators should join in all acts to be done by them in their official character, as in giving a release, &c., because as it was said, administration was in the nature of an office, and "if an office were granted to two, they must join in executing the act of the office." *Hudson v. Hudson*, 1 Atk. 461. Of this, however, the author of the *Touchstone* made a *quere*. *Shep. Touch.* 484-5; and since that, the distinction has been repudiated. *Jacomb v. Harwood*, 2 Ves. 267-8, and *Willard v Fenn*, there cited by the Master of the Rolls. But then, as long as this distinction prevailed between executors and administrators, there was precisely the same reason for applying the same rule to administrators that was always and uniformly held to be applicable to trustees, in giving receipts for money. Since we find then, that at different times different opinions have been entertained, even by those learned in law, as to the necessity of all the personal representatives of a deceased person joining in a release, receipt, or other act, in the course of their administration, would it not be very unreasonable to make executors, who may be quite unlearned in the *quiddities* of the law on this point, responsible for moneys received by a co-executor, merely because they had unnecessarily joined with him in giving a receipt for it? It is at most but a mere supererogatory, or perhaps, more properly, nugatory act, that can produce no possible injury to any one, and therefore ought not to be made the basis of a claim.

[*157] The understanding *and intention of the parties to the transaction, ought to be looked to, and, if innocent, ought to make the law of the case. And when a party requires a receipt to be signed by all the executors or all the administrators, when he has paid the money only to one of them, why should he not have it, if they are willing to give it, without their incurring the risk of paying a penalty for doing so? I repeat again, that I cannot believe that such receipt is ever signed by those who did not participate in the receipt of the money with a view to guaranty either the honesty or solvency of the receiver. They receive no consideration, and have no motive whatever for doing so. And after the money has been so received, what good can it do to those interested in the estate, for the other executors to refuse signing the receipt? None whatever; while, on the other hand, their signing the receipt can work no possible injury to either creditors, legatees, or distributees, and certainly puts nothing into the pockets of the non-receiving executors or administrators. Would it not then be most unconscionable to make them accountable for money which they never received, and from which they never derived any benefit whatever; and in respect to which they had done nothing to prejudice the right

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of any one, or in the slightest degree to hinder or delay his claim? But, if it be said, that it is not on the ground of intention that they are to be made liable by joining in the receipt, but because they have done an unnecessary act, one which the law did not require them to do, because the receipt of the one who was the receiver was a sufficient discharge in law, the insufficiency, if not the absurdity, of such a proposition has been already made manifest. It would not only be inequitable and unjust, but repugnant to the whole tenor of the common law, to make a man liable to pay money who had never either expressly or impliedly undertaken to do so; who had violated no law, and done no act that could injure the right of any one or yield the least possible advantage to himself.

From this view of the subject I am induced to believe that there is no good reason for making executors or administrators liable more than trustees for moneys which they have never actually received, merely because they have joined in a receipt with the co-executor or co-administrator who did receive it. The receipt when proved, must always be considered *prima facie* evidence against each of the signers that he received the money; and if he wishes to avoid the consequent liability, it will lie upon him to prove who did receive it, and that it was not received by him.

The distinction which has been taken in some cases, and mentioned in others, for executors being liable to creditors and not to legatees, for losses in the estate, is not without reason, or at least the appearance of it. The creditors of the testator have claims upon his estate, which he cannot defeat or set aside; nor can he give any latitude of discretion whatever to his executors that will prejudice his creditors, in applying his estate to the payment of them. The law lays down the rule here by which the executors respectively are *to govern themselves. [*158] But after his debts are paid out of the estate, the testator can dispose of the residue as he pleases, and prescribe the course that the executors shall pursue in the administration of it. In short, his will, so far as it can be discovered, may be considered their guide and protection: and hence, as long as the executors shall manage this part of the estate in accordance with the ideas and notions which the testator himself entertained of it, and have done nothing but what there is reason to believe he would have approved, could he have been consulted, it would seem to be unreasonable to make them responsible for losses attending it. This principle has been adopted in several of the cases already referred to, and is directly applicable to the one before us. It is evident that the testator in his lifetime considered the bond of George and John Shelmire perfectly good; and I think I may say ex-

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clusively so, upon the sole responsibility of John : for in 1813, three years after this bond had been given, and after it had become payable, there was a meeting of George's creditors, about receiving payment of their debts, as it is said, which would seem to indicate the doubtful circumstances of George at that time, yet the testator declined receiving the amount of his bond, stating that he did not want it in his lifetime. He was content with receiving the interest upon it, which was paid to him annually until his death in 1816. By his will he, among other things, directed that two of his executors, John and Samuel M'Nair, two of his sons, should put out to interest for the use of their sister Rebecca, twenty-six hundred and sixty-seven dollars of his estate "on land security, or otherwise render it safe and productive, and pay the proceeds thereof, from time to time, (as they in their wisdom should judge most for her benefit,") to her during her natural life. The interest upon the Shelmire bond, was paid to the executors for the year 1817, and perhaps 1818. George S. Shelmire removed from this state to that of New York, in March, 1817, in less than a year after the death of the testator, when he was considered insolvent. In April, 1818, John Shelmire, the other obligor, died, leaving a large estate, but it turned out afterwards upon a suit brought to recover the amount, against his executors, who refused to pay the bond, that it was adjudged to be joint and not several, and therefore the executors of Samuel M'Nair were held not entitled to recover upon it against the estate of John, as George survived him. Among gentlemen of the bar, there was a diversity of opinion whether the bond, taken in connection with its condition, and judging from the face of the whole, was not several. It does not appear that the testator in his lifetime, or his executors after his decease, ever had the least idea that it was any other than a bond in common form, such as would be binding upon both, or either, and that the death of one could not relieve his estate from the payment of it. Resting secure under this conception of the nature of the bond, the great wealth of John Shelmire, one of the obligors, afforded the most perfect assurance of the payment of its amount being [*159] "rendered safe and productive" according to the words of the will. Indeed it is not pretended that the bond of any other man in the country could have made it more so. Is it likely then that the testator, had he continued to live during the life of John Shelmire, wanting only the interest on the bond, and receiving that as called for, would have pressed, or even asked for the payment of the principal? He was content to let it rest in this way during his life, considering it perfectly "safe and productive : " and it does not appear that there was

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any change in the circumstances of the obligors, after the death of the testator, as long as John Shelmire continued to live. It may therefore be reasonably inferred, that had he lived until the death of John Shelmire, he would have done as his executors have. Taking therefore the conduct of the testator himself, together with the directions contained in his will, as the rule for the executors to go by, I think it would be too severe to make them answerable for the loss of the amount of the Shelmire bond.

The circumstance of one of the legatees having offered to take this bond, which has been so much relied on to make the executors responsible for the loss of it, is perhaps quite as much in their favour as against them. For if it was offered to be taken as so much cash, as has been suggested, in discharge of the legacy *pro tanto*, it goes to show that such legatee thought it indisputably good, and furnishes strong evidence to sustain the integrity and purity of intention of the executors, and that all were deceived in the opinion which they entertained of the bond, and the nature of it, as to its binding efficacy; and likewise tends to render it probable, that John, one of the executors who is said to have objected to parting with the bond in that way, might have thought that it would perhaps answer to form a part of the fund which they, according to the directions of the will, were to establish for the benefit of their sister Rebecca, as it was then yielding interest on its amount daily, and seemed to be thought by all concerned in the estate, safely secured.

When it was, that Craven, one of the legatees, offered to take the Shelmire bond as part of the estate of the testator, does not precisely appear, but it is said to have been about a year after the death of the testator, and certainly before the death of John Shelmire. In what way or upon what terms and conditions this bond was offered to be taken, does not distinctly appear. The conversation about it, seems to have taken place at a meeting of the executors and legatees, held for the purpose of making some arrangements for the distribution of the estate according to the directions of the will; but whether any distribution was then made, or when it was made, is not shown. It is most likely that no final and positive distribution was then made, for from some of the testimony it would seem probable that the executors interposed an objection at some time, which may have been then, that no refunding bonds were offered. It does however appear that a bond which was held by the testator at the time of his death and came to the hands of his executors, upon a certain James Allison *was taken by one of the legatees, but not being able to make it answer his purpose, it was re- [*160] turned, and the legatee finally not charged with it, which shows that this bond though taken, was only taken conditionally. In

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short, the testimony in respect to all this matter is very vague and unsatisfactory, and in my opinion not sufficient to warrant a decision that there ever was any final distribution and appropriation of the amount of the Shelmire bond to the fund of twenty-six hundred and sixty-seven dollars, which was to be set apart for Rebecca's use during her life, and I therefore think, that the loss of it ought not to fall upon the trustees of Rebecca, nor yet upon Rebecca herself, and those who after her death are to succeed to this fund.

And although some of the legatees might have been willing at one time to have taken the Shelmire bond as cash, there is no reason to believe that it was because the executors did not require payment of it from the obligors. None of them ever complained of the executors that they were neglecting their duty in this respect. Indeed, it would rather seem that the legatees were not solicitous about collecting the moneys due to the estate if well secured; and that the executors were not willing to give indulgence, in some cases at least, without the consent of the legatees; for all this appears to have been the case with respect to the debt due upon the bond against the estate of James Allison, which was outstanding at the time the executors stated their account; and the delay in the collection of it is stated and admitted to have taken place with the assent and approbation of the legatees. When we look at all these things, and take them into our consideration, it is difficult to resist the conviction, that the course pursued by the executors until after the death of John Shelmire, created no dissatisfaction with any of the legatees and those concerned in interest in the estate; but on the contrary, was adopted, in part at least, by the former because it met the approbation of the latter.

The executors were not to blame for refusing to take the judgment bond and mortgage proposed to be given by George S. Shelmire, for the bond which had been given by himself and his father John Shelmire, for it has not been shown that he had any title for the land that he offered to give a mortgage on; nor that it was of any value: as to his judgment bond, that would have been worthless, unless it were shown that he had property of some value. But the testimony rather goes to prove that he was insolvent before he left this state, and at the time of leaving it in 1817, and that finally he was compelled to seek relief from the insolvent laws of New York state.

Beside, it must be recollected too, that at the time this offer was made by George, the executors believed that the estate of John Shelmire was liable for the payment of the bond, so that to have acceded to the proposal of George, would have been to give up what they considered a good security for the debt, for

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one that they knew nothing about, which would have been certainly culpable.

*I think it reasonable that the executors should be allowed for the costs and expenses incurred in prosecuting [*161] the several suits upon the Shelmire bond, for they, in truth, appear to have acted with good faith through the whole of this business, and it would be wrong, under all the particular circumstances of this case, that they should be made to bear the losses attending it.

The decree of the Circuit Court is affirmed.

Ross, J.—I am clearly of opinion, the executors rendered themselves liable by their gross neglect in not securing the money due from Shelmire when it was perfectly within their power to have done so. Their refusal to give the bond to one of the legatees, who was desirous of taking it in payment of her legacy, and insisting on keeping it themselves was not justified by any circumstance which has appeared in evidence. By such refusal the executors rendered themselves responsible for the payment thereof. No case has been cited which bears the slightest resemblance to the one under consideration. The case of a principal neglecting or refusing to receive his debt, when in his power to do so, and who thereby exonerates the surety, is on principle more analogous to the circumstance of this case, than any which have been adverted to. The ignorance of the executors of the law on the facts, which it was their bounden duty to know and ascertain, and which they might have known by exercising due diligence and prudence in the performance of their duties as executors, ought not, in my opinion, to avail them. If it will exonerate them, few executors can hereafter be made liable. There are indeed but few among them who are capable of fulfilling the duties intrusted to them, and if men will undertake the management of trusts, which they are entirely incompetent to perform, and afterwards neglect to seek correct information from those who are able to give it, justice, reason, and the soundest principles of equity require, that any loss which thereby ensues, shall fall upon those, in consequence of whose neglect or mismanagement, such loss has occurred.

This is very briefly the ground upon which I dissent from the opinion of the majority of the court.

Decree of the Circuit Court affirmed.

Cited by Counsel, 5 Wh. 476; 6 W. 188; 3 W. & S. 368; 2 Barr, 260; 3 Barr, 427; 5 Barr, 226; 12 H. 415; 10 C. 30; 11 C. 295; 1 Wr. 326; 3 O. 83, 367.

Approved in 6 W. 253; commented on 11 C. 296.

Cited by the Court, 1 W. & S. 292; 10 Barr, 153; 5 H. 271; 7 S. 53; 6 O. 460.

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In 6 O. 460, it is said that it is difficult to see why the rule laid down in this case (as well as in *Brown's Ap.*, 1 D. 311, and *Verner's Est.*, 6 W. 250,) should not apply to creditors as well as legatees, and *Sterrett's Ap.*, 2 P. & W. 419, is cited as an authority against the distinction; certain it is that the authorities are contradictory, 11 C. 295; but this case rather than *Sterrett's Appeal* seems to be supported by the weight of the authorities. In 6 Barr, 270, it is said that joint executors are liable individually no further than assets have come into their hands, or where they have done some act which the law considers equivalent to an admission that the assets were in their power and culpably and negligently parted with.

In 1 W. 368, a distinction is taken between joint executors and joint administrators, the latter being responsible for each other as principals. This distinction is overlooked in the case in hand.

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*[PHILADELPHIA, FEBRUARY 12, 1833.]

Harrison against Ellmaker.

IN ERROR.

Under the fee bill of the 28th of March, 1814, the recorder of deeds can only charge thirty-seven and a half cents for a certificate and seal, and cannot add to it a charge of twelve and a half cents for a search made to enable him to give the certificate. If he exacts payment of such double charge, he incurs the penalty of fifty dollars imposed by the 26th section of the fee bill.

THIS was a writ of error to the Court of Common Pleas of the county of *Philadelphia*, in an action originally brought by the defendant in error, Levi Ellmaker, against the plaintiff in error, John Harrison, then recorder of deeds of the city and county of Philadelphia, to recover the penalty of fifty dollars imposed by the 26th section of the act of 28th of March, 1814, entitled "An act to establish a fee bill." 1 Purd. Dig. 311.

The section referred to declares, that "if any officer whatsoever, shall take greater or other fees than is hereinbefore expressed and limited, for any service to be done by him after the 1st of September next, in his office, or if any officer shall charge, or demand and take any of the fees hereinbefore ascertained, where the business for such fees are chargeable, shall not have been actually done and performed, or if any officer shall charge or demand any fee for any service or services, other than those expressly provided for by this act, such officer shall forfeit and pay, to the party injured, fifty dollars, to be recovered as debts of the same amount are recoverable," &c.

The alderman gave judgment for the plaintiff, and the defendant appealed to the Court of Common Pleas, where a case in the nature of a special verdict, was stated for the opinion of the court, which, in substance, was as follows.

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By the 18th section of the fee bill, of the 28th March, 1814, (Purd. Dig. 309, 310,) the recorder of deeds is authorized to charge for "certificate and seal, thirty-seven and a half cents," and for "every search of record where no other service is performed, for which fees are given, twelve and a half cents." The plaintiff below, on the 12th of July, 1821, requested from the defendant, then recorder of deeds for the city and county of Philadelphia, a certificate under seal of the record of an assignment to himself and Jonathan Merchand, by Franklin Rising. The certificate was given to him by the defendant, who demanded for it fifty cents, as for the following services, viz.: "for search twelve and a half cents, for certificate thirty-seven and a half cents." The plaintiff refused to pay the fees thus demanded and offered to pay thirty-seven and a half cents, but the defendant insisted on his right by law to receive the amount *he demanded, upon which the plaintiff paid it, and took [*163] from the defendant a receipt in these words:

"Received July 12th, 1821, from Mr. Levi Ellmaker, fifty cents for search and certificate, Franklin Rising's assignment."

The Court of Common Pleas having given judgment in favour of the plaintiff, the defendant sued out a writ of error, and assigned for error,

"That according to the true construction of the act of assembly referred to, the defendant below is not liable to the penalty of fifty dollars claimed to be recovered from him in this suit."

J. Randall, for the plaintiff in error.

Henderson, for the defendant in error.

The opinion of the court was delivered by

HUSTON, J.—This matter is too plain for argument. When a person applies to an officer to see a record, and only wishes to see it, or know if there is such a record, the fee bill gives the officer the fee for a search. When a person applies to an officer for a copy of a record, or a certificate of the date of a record, the officer must find the record before he can make the copy, or give the certificate required. This search is for his own use and benefit; he makes the copy or gives the certificate; and is paid for so doing, and has no right to charge for a search. The words of the act are plain, cannot be mistaken, and ought not to be evaded.

Judgment affirmed.

Cited by Counsel, 5 W. & S. 24.

[PHILADELPHIA, FEBRUARY 15, 1833.]

Chew *against* Keck and Others.

APPEAL.

The seal of a foreign corporation cannot be admitted in evidence without proof that it is the official seal which it is asserted to be.

If a similar seal has already been given in evidence, without objection, the jury are not to be permitted to compare the two seals, and judge of the genuineness of the second from the comparison.

If upon a hearing of the cause before arbitrators, the seal has not been objected to, the party offering it on the trial in court, is not entitled, on the ground of surprise, to have a juror withdrawn.*

APPEAL from the Circuit Court of *Northampton* County.

In this ejectment, brought by Benjamin Chew, Esq., against Conrad Keck and others, which after an award of arbitrators between the same parties, came on for trial before Huston, J., [*164] at a Circuit *Court, held at Easton, in April, 1832, the plaintiff, after having given in evidence, a lease for one year, dated September 4th, 1815, from Francis Rice and John Kelb, executors of Thomas Ingram, proved before the Lord Mayor of London, and certified under the city seal, offered in evidence the deed of release between the same parties, dated on the fifth of the same month, and proved in like manner, to which the defendant's counsel objected, on the ground that it must be first proved that the seal annexed to the certificate is the seal of the city of London.

The court rejected the evidence.

The plaintiff's counsel thereupon alleged that they were taken by surprise, inasmuch as this objection was not taken before the arbitrators, and they, the counsel, had always understood that the seal of the city of London proved itself. They therefore asked the court for leave to withdraw a juror, offering to make affidavit of the fact of having been taken by surprise.

The court refused to permit juror to be withdrawn.

The plaintiff's counsel then submitted to the court, that they should be allowed to lay the seal in question before the jury, that they might compare it with the seal affixed to the paper already in evidence. This was also refused by the court; upon which the plaintiff suffered a nonsuit with leave to move to take it off.

* The difficulty of proving the seal of a foreign corporation, strongly appears in the case of *Moises v. Thornton*, 8 D. & E. 303.—REPORTER.

[Chew v. Keck and others.]

A motion to take off the nonsuit was accordingly made, which the court overruled and the plaintiff appealed.

The following reasons for the appeal were filed in this court, viz.,

1st, The court erred in rejecting the deed of release from Francis Rice and John Keble to Benjamin Chew, of the date of 5th September, 1815, and in requiring proof of the seal of the Lord Mayor of the city of London.

2d, That the objection to the admission of the said deed of release, if available, was taken too late; it should have been taken before the deed of the lease of 4th of September, 1815, had been read, which accompanied and was annexed to the deed of release, was proved by the same deposition, attested by the same seal, was in substance and effect one instrument with the release, and was in this respect read without objection.

3d, The court should, on the allegation of surprise made by the counsel, and supported by the facts, that although the said deeds were objected to on other grounds before the arbitrators, yet no objection was made on the ground of want of proof of the seal of the city of London, have inquired into the matter and permitted a juror to be withdrawn and the cause continued; because, if the objection had been taken before the arbitrators, the plaintiff could have had the proof of the seal at the trial, and the objection therefore took the plaintiff's counsel by surprise.

4th, The court should have permitted the plaintiff to submit the seal annexed to the probate of the deed of release to the jury, for *comparison by them, with the other seals of the same officer annexed to the other documentary evidence which was before the court and jury, with an instruction that if from such comparison the jury believed the impression of the seal to be a genuine one, they should consider the deeds in evidence; otherwise not.

The case was argued by *Brooke* and *J. M. Porter* for the appellant, and by *Scott* for the appellees.

The opinion of the court (Huston, J., being absent) was delivered by

GIBSON, C. J.—It is impossible to distinguish this case from *Foster v. Shaw*, 7 Serg. & Rawle, 156, which is directly in point, and therefore conclusive in a case precisely the same in all its circumstances. We do not decide, however, the question of competency in regard to such a deed when actually recorded—possibly that might make a different case. The objection here was made in time, and the court was not bound to withdraw a juror on the allegation of surprise, or refer the question of ex-

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ecution to the jury, without at least some proof of the seals; so that we see no ground to justify us in disturbing the decision of the Circuit Court.

KENNEDY, J.—The first reason assigned for a new trial is, that the Circuit Court refused to admit the deed of release from Francis Rice and John Keble to Benjamin Chew, bearing date the fifth day of September, 1815, to be read in evidence to the jury, unless proof were first made that a seal purporting to be the seal of the city of London affixed to a name and signature purporting to be those of the lord mayor thereof, subscribed to a certificate of probate of the execution of the deed indorsed on it, was the seal of the said city. The decision of the Circuit Court on this point appears to me to be wrong, and I therefore think, that on this ground alone a new trial ought to be granted. The judge before whom this case was tried in the Circuit Court, doubtless felt himself bound by the decision of this court in the case of *Foster v. Shaw*, 7 Serg. & Rawle, 163. And sitting in the Circuit Court, I would certainly have decided in the same way, had I not looked upon that decision as not only militating against the principle laid down by the judges of the Supreme Court of this state in 1781 and 1784, in the cases of *M'Dill's Lessee v. M'Dill*, 1 Dall. 63, and *Hamilton's Lessee v. Galloway*, Ib. 93, but completely overturning a construction thereby given to our recording acts, which I think has been almost universally followed and received ever since, without objection. I would not wish to be understood as insinuating that a Circuit Court, or any other inferior tribunal, may, when it conceives that the Supreme Court has decided or settled any question erroneously undertake to correct it by deciding otherwise. This authority is reserved for the Supreme Court itself; and in order that uniformity and consistency may be preserved as far as is possible, in settling our principles of jurisprudence, it is proper that it should be exercised by it alone. But with two decisions of [166] the judges of the *Supreme Court, giving a construction to our recording acts, agreeing as I believe with the spirit of them, and followed by a corresponding usage and practice of half a century to back and support me, I would not hesitate to encounter a single decision of that court although of a later date, but alleged to be made for reasons which I consider untenable, because directly at variance with the express provisions of the recording acts themselves.

Since I first saw this decision in the case of *Foster and Shaw*, which was shortly after it was published, I have often thought of it, revolved it over in my own mind, and compared it with the provisions and terms of the acts of assembly relating to the

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recording of deeds and conveyances for lands, and the two other decisions already mentioned, which were made long before it, with a view and a wish to reconcile it with them if possible, but in vain.

The fourth section of the act of the 28th of May, 1715, entitled "An act for acknowledging and recording of deeds," enacts, that "all deeds and conveyances made and granted out of this province, and brought hither and recorded in the county where the lands lie, (the execution whereof being first proved by the oath or solemn affirmation of one or more of the witnesses thereunto, before one or more of the justices of the peace of this province, or before any mayor, or chief magistrate, or officers of the cities, towns, or places where such deeds or conveyances are or shall be made or executed, and accordingly certified, under the common or public seal of the cities, towns, or places, where such deeds or conveyances are so proved respectively,) shall be as valid as if the same had been made, acknowledged, or proved in the proper county where the lands lie in this province."

Now this section of the act declares most unequivocally, that all deeds and conveyances made out of this province (now state) and proved by one or more of the witnesses thereunto before the mayor of the cities where such deeds or conveyances shall have been made, and accordingly certified under the common or public seal of those cities where such deeds are so proved, shall be as valid as if the same had been made, acknowledged, or proved, in the proper county where the lands lie. Then, by referring to the second section of the act, we discover what the validity is that is given by it to deeds made and proved in the county where the lands lie. It is expressed in the following words: "All bargains and sales, deeds and conveyances of lands, tenements, and hereditaments in this province, may be recorded in the said office; but before the same shall be so recorded, the parties concerned shall procure the grantor or bargainor, named in every such deed, or else two or more of the witnesses who were present at the execution thereof, to come before one of the justices of the peace of the proper county or city where the lands lie, who is hereby empowered to take such acknowledgment of the grantor, if one, or of one of the grantors if more." Then, by going back to the first section of the act, we find by it, that after establishing the office mentioned in the second section, just recited, for the recording of deeds in each *county [*167] of the province, and after requiring that the recorder shall duly attend the service of the same, and at his own proper expense, cost, and charges provide parchment or good large books, it directs, "that he shall record therein, in a fair and legible

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hand, all deeds and conveyances which shall be brought to him for that purpose according to the true intent and meaning of this act." Here the question then naturally presents itself, what are the deeds that may be recorded according to the true intent and meaning of the act? It appears to me that it is answered by the act itself, in terms so plain and intelligible, that their meaning cannot be misapprehended; for by the second section it is declared, that "all bargains and sales, deeds and conveyances of lands, &c., may be recorded, &c., being first acknowledged by the grantor or bargainor named in every such deed, or else proved by two or more of the witnesses who were present at the execution thereof, before one of the justices of the peace of the proper county or city where the lands lie," who is required by the third section to certify such acknowledgment or probate when taken, under his hand and seal, upon the back of the deed. And again, by the fourth section it is provided, that "all deeds and conveyances made and granted out of this province, and brought hither, may be recorded in the county where the lands lie, the execution whereof being first proved, by the oath or solemn affirmation of one or more of the witnesses thereunto, before one or more of the justices of the peace of this province, or before any mayor, &c., of the cities, &c., where such deeds or conveyances are or shall be made or executed, and accordingly certified, under the common or public seal of the cities, &c., where such deeds or conveyances are so proved." Thus embracing in this last section in clear and express terms the deed in question, as one entitled to be recorded when brought hither for that purpose. It is likewise equally clear from the terms of the act, that no deed is authorized to be put on record unless the execution of it be first either acknowledged or proved, and such acknowledgment or probate be certified by an officer thereby empowered to take it, in the manner and form prescribed by the act. And indeed it is difficult to account for the legislature's having directed the form with so much particularity in which these certificates shall be made out and given, if it be not to make them *prima facie* evidence, of themselves, of the execution of the deeds, and as such to be received and admitted, not only by the recorder, but likewise by the courts. The recorder must determine by a mere inspection of the deed and the certificate indorsed thereon, when brought to him for the purpose of being recorded, whether it comes within the true intent and meaning of the act; for he has no means of ascertaining it otherwise: he has no power to administer an oath or affirmation, or to take testimony in any form on the subject. Such a thing is not contemplated by the terms of the act. If the deed have a certificate indorsed upon it, purporting that it was acknowledged or proved before an offi-

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cer authorized by the terms of the act to take it, and has apparently *the name of such officer subscribed, together with [*168] the proper seal affixed to the certificate, it is, under the provisions of the act, not only *prima facie* evidence of the execution of the deed, but likewise of the authenticity of the certificate of acknowledgment or probate itself. It is made by the act of assembly *per se* presumptive evidence of the execution of the deed, but being only presumptive, may of course be repudiated or rebutted by other testimony.

If the legislature had not intended this, they would certainly have made some further provision for taking proof to authenticate the certificate of the acknowledgment or probate of the execution of the deed; for, with me, it is impossible to doubt for a moment, that the legislature did not intend to put it in the power of a party having a deed for land to dispense entirely with the common law mode of proving the execution of it, and to make the substitute provided for it by the act perfect without any ancillary aid from the common law so far as to make the deed admissible in evidence, if pertinent to the issue. This must necessarily be the proper construction of the act, because the recorder has not the means of ascertaining whether the certificate of acknowledgment, or probate of the execution of the deed indorsed upon it be genuine or not. He has no authority given him to administer an oath, or to take testimony for such purpose in any way whatever. He cannot even take the acknowledgment of the execution of the deed from the grantor himself, were he to appear in person before him, nor yet the proof of the execution of it by him from the subscribing witnesses. And were he to do so, and to put the deed on record in his office, certifying such acknowledgment or proof of its execution, without any other evidence appearing of it, it would be a perfect nullity, without the least validity, and could neither make it admissible in evidence, nor answer any purpose whatever within the design of the act. Hence, when a deed is brought to the recorder to be recorded, it necessarily follows that he must judge from the face of the certificate of acknowledgment or probate indorsed on the deed of its having been executed: and if the certificate purports to be such on its face as the act of assembly has authorized, it is made his duty to record the deed, and he is not bound to look or examine further; the words of the act are peremptory "that he shall record," &c.

The act has uniformly received this construction, as to the certificates of acknowledgments or probates given by justices of the peace, judges of the courts, and other officers of the state, authorized by the act to take such acknowledgments or probates.

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No proof has ever been required to prove the authenticity of their signatures or seals to such certificates, though in many instances the recorders, courts, and juries, knew nothing of them more than they do of the seals of foreign cities or corporations. They have always been considered *per se prima facie* evidence of this. *M'Dill v. M'Dill*, 1 Dall. 63; *Hamilton v. Galloway*, Ib. 93; *Willink v. Miles*, Peter's C. C. Rep. 429. And this is by [*169] force of the act of assembly that they have been so *received: for by the common law, the signature of a justice, or of a judge of a court, and their respective seals, are no more admissible in evidence, as such without proof being first made of their authenticity, than the signature and seal of any private individual, or that of the chief magistrate of a foreign corporation, under the common or public seal thereof. 1 Hale P. C. 305; 2 Ib. 52; *Gilb. Ev.* 124. But it is perfectly manifest from the terms of the act, that the certificate of the mayor of a foreign city, given under his hand and the common seal of the city, is put on the same footing with a certificate of a justice of the peace of the county where the land lies, which being given under his hand and seal, is considered and made proof of itself, to entitle the deed upon which it is indorsed, to be admitted to record, and of course to be admitted in evidence on the trial of an issue where it may be pertinent; for both the letter and the spirit of the act require, that due proof of the execution of the deed shall be made before it shall be recorded; and without such proof of the execution of the deed being first made as is required by the act, it is evident that the legislature did not intend that it should be recorded. Besides, it is impossible in the nature of things, that recording of the deed can contribute in the slightest degree to the proof of the execution of it; and the bare act of recording the deed, and certifying that it has been done, is all that the recorder has to do with it; for, I repeat, he has no power whatever to take or to collect proof of the execution, but merely to examine and see before he does record it, that it has a certificate thereof indorsed upon it, appearing on its face to be such as the act of assembly requires. And if he were to record a deed without such certificate of proof of the execution being indorsed, it would be a mere nullity. To demand proof of the authenticity of the certificate, would be to exceed the requisitions of the act; for it cannot be pretended in any case whatever, either in the case of a deed executed and acknowledged or proved abroad, or executed and acknowledged or proved at home within the state, that the act requires proof to be made of the genuineness of the certificate. Besides, to demand such proof to be produced and made within the state, is at once to defeat the facility of establishing the execution of

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deeds, which was the sole object and design of the act in authorizing the acknowledgment or probates of those executed abroad for lands lying within this state, to be taken and made where they were executed. And, in short, if the language and plain obvious meaning of the act are not to govern, the course of proof may be made interminable, and we shall be without any rule on the subject, having neither common law nor statute law to direct us.

If the deed in this case, then, be authenticated in such manner as to entitle it to be recorded under the provisions of the recording act, as I think I have shown most clearly that it is, the decisions of the judges of the Supreme Court in the cases of *M'Dill v. M'Dill* and *Hamilton v. Galloway*, are direct and positive authorities in favour of its having been received in evidence on the trial of the cause. *The court in [**170*] *Hamilton v. Galloway* say, "the deed may be read in evidence, for the recording does not contribute to the proof of the deed, which is established by the oath before the justice: the recording only gives the deed a special operation by the express provisions of the act of assembly." The special operation given to the deed by the recording of it, which is here alluded to by the court, is declared and set forth in the fifth section of the act, and clearly has nothing to do with making the deed admissible in evidence. But this section also enacts that the copies from the record of all deeds recorded in pursuance of the act, given by the recorder and certified under the seal of his office, shall be allowed in all courts where produced, and declares that they shall be as good evidence and as valid and effectual in law as the original deeds themselves, and that they may be shown, pleaded, and made use of accordingly. Now, if the deed in question had been recorded, and a copy from the record of it duly certified had been offered in evidence, I do not see what possible objection could have been made to it, unless the act of assembly is to be entirely overlooked, and common law principles merely are to prevail. At least it is quite obvious from the nature of a copy, that the impression of the seal of the city of London could not appear on it and it would therefore be impossible to call a witness, however well he might know the common seal of the city of London to prove that it was affixed to the certificate of probate on the copy. But the act of assembly has declared that such copy shall be allowed in all courts when produced, and be as good evidence as the original and receivable as such, wherever the original might be admitted: but if it is to be received at all, it must necessarily be admitted without proof being first made that the probate of execution is certified under the common seal of the city of London, for no impression of the

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kind being on the copy, it would be utterly impossible to make such proof, which, in my humble conception, proves to demonstration the incongruity of the decision of this court in the case of *Foster v. Shaw*, when compared with the palpable and plain provisions of the act. But if it be considered, which I think is the fair construction of the recording act of 1815, that it makes the certified copy from the record of the deed only "as good evidence as the original, and receivable as such wherever the original may be admitted," so that if the original were not receivable in evidence before, or at the time of its being recorded, it is then as clear as the light of noonday, that a certified copy from the record of it cannot be receivable in evidence, unless the original were so at the time of its being recorded: and of course, according to the decision of the court in this case, a certified copy from the record of the deed in question, if it had been recorded, could not have been received in evidence by the Circuit Court. It seems to follow also as a necessary consequence, that although recorded by the recorder of deeds in the proper office, such record would not be constructive notice of its existence to subsequent purchasers, or mortgagees for valuable [*171] consideration, and that it cannot have the operation and effect declared by the act of assembly, in any way whatever; and these, as it appears to me, are some of the inevitable consequences which must result from the decision of this court in *Foster v. Shaw*, and the one just now made in this case, and may very justly excite alarm, for I apprehend that many deeds apparently proved in the same manner as the deed in the present case without a shadow of other proof, have been placed on record by the recorders of deeds, believing it to be their duty to do so, because the act of assembly in so many words required it of them.

It is easy to see that this question was not decided in the case of *Foster v. Shaw* in conformity to the directions of the act of assembly, but I think it is not quite so easy to perceive upon what principle it was settled. The court were of opinion that if proof of the seal of the city of Dublin had only been given, without any proof of the handwriting of the mayor of that city, whose name was subscribed to the certificate, that the deed would then have been admissible in evidence, otherwise not. But why hold that necessary, and that alone sufficient proof of the giving of the certificate by the mayor of Dublin, without proof also of his handwriting? For proof of the seal of a foreign court without proof also of the handwriting of the judge subscribing and certifying a judgment or sentence of it is not sufficient to render it admissible evidence; both the seal and handwriting must first be proved. *Henry v. Adey*, 3 East, 221; *Delafield v. Hand*,

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3 Johns. 310 ; Phil. Evi. 301. Neither does the seal of a corporation when proved seem to verify whatever it may be affixed to. *Stoever v. Whitman*, 6 Binn. 416. It is not a different answer to this objection, to say, that the act requires the certificate to be given under the seal of the city in such case, and therefore proof of its being the seal of such city is necessary to satisfy the demands of the act ; because the act also requires that all certificates given in pursuance of it, shall likewise be under the hands of the officers respectively giving the same, and if proof of the seal be necessary under the act, proof of the handwriting of the mayor would seem to be equally so. But why stop here ; why not go further and require proof also of the appointment of such mayor, and again, that the city of which he professes to be mayor is a corporation, and has a right to use such a seal ? And if taking proof of the execution of the deed be considered a ministerial act merely, then the oath of the officer taking it, or of some one who was present at the time of taking the proof would be requisite to prove the truth of the certificate before it could be given in evidence. *Gilb. Ev.* 124 ; 1 *Hale P. C.* 305 ; 2 *Hale P. C.* 52.

These are difficulties, however, which can only be raised when we fail to adopt the act of assembly as the rule of our decision, and therefore ought not to be overlooked in settling the question before us.

That a copy from the record, duly certified by the recorder, would not have been admissible in evidence, has not been seriously *contended for, had the deed in this case been recorded, nor do I see how it could with the least degree [*172] of plausibility, consistently with the directions of the act of assembly. But if the copy, not of the deed itself, but of the record of it, which is in truth only the copy of a copy, be admissible, of which it appears to me there cannot be the slightest doubt, and yet it be held that the original cannot be received, it necessarily leads to this conclusion, that the original is not as good evidence as the copy even of a copy of it ; a proposition so much at variance with all those rules and principles of evidence, which have been founded upon the experience and wisdom of ages, and are so admirably adapted to the attainment of truth, without which justice cannot be administered, that I cannot yield my assent to it. But it is said that under the act of assembly the original possibly might be receivable in evidence when recorded, although without being so it cannot. It is very certain that the act in terms has not so declared it. The fifth section, which declares the effect of recording, enacts that all deeds and conveyances when duly recorded, "shall be of the same force and effect here for giving posses-

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sion and seisin, and making good the title and assurance of the said lands, tenements, and hereditaments, as deeds of feoffment with livery and seisin, or deeds enrolled in any of the king's courts of record at Westminster are or shall be in the kingdom of Great Britain," without using a single word or expression tending in the least to show that the legislature intended that they should be received in evidence when recorded, although not before. Now, it is, as was rightly held in *Hamilton v. Galloway*, 1 Dall. 93, the probate or acknowledgment of the deed before the proper officer, that makes it admissible in evidence, and not the recording of it, for without being proved so as to be admissible in evidence, it is not entitled to be recorded. It is said, however, that by requiring deeds to be recorded as well as acknowledged or proved in the manner pointed out by the act, before they shall be received in evidence, may afford protection against imposition and fraud arising from forgery or other malpractices; because after they are placed upon record, every person concerned or interested, may not only thereby come to a knowledge of their existence, but provide more effectually against any unjust and evil effect or operation from the use of them. But to this it may be replied, that as the legislature, from the wording of the act do not seem to have intended, or had such object in view, courts surely can have no authority for directing it. And beside, even under this construction of the act, the deed that is recorded but the minute before it is offered in evidence, must be considered as fully admissible as if it had been recorded years before, so that the recording of it may be managed and done by the party holding it, in such a way as to have the benefit of giving it in evidence, without affording much if any advantage to those who may be concerned so as to apprise and enable them to defend against the operation of it, as has been suggested. It appears to me that the [*173] second *section of the act of the 18th March, 1775, which is a supplement to the act of 1715, fortifies and strengthens the view which I have taken of this matter, in declaring still further the effect of neglecting to record a deed within a limited time; which is, that if not recorded within six months after its execution, it "shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such deed or conveyance be recorded as aforesaid before the proving and recording of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim." This provision then, in connection with the seventh section of the act of 1715, which declares, that "if any person shall forge any entry of the said acknowledgments, certificates, or indorsements, whereby the freehold or inheritance

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of any man may be charged, he shall be liable to the penalty against forgers of false deeds, &c. And if any person shall perjure himself in any of the cases hereinabove mentioned, he shall incur the like penalties as if the oath or affirmation had been in a court of record," seems to have been, in the opinion of the legislative body at those different times, all that was requisite in order to guard and provide against the evils or inconveniences that might arise from men neglecting or refusing to record their deeds; without declaring that until recorded they should not be received in evidence, or be otherwise first proved according to the rules of the common law. A clause to this effect could readily have been inserted, if the legislature had designed such a thing, but it is clear to my mind, that the very reverse was intended. They intended to dispense entirely with the common law mode of proving all such deeds, when proved in the manner prescribed by the act, whether recorded or not.

In conclusion, I will refer to *Milligan v. Dickson*, Peters C. Rep. 433, where a certified copy from the recorder's office of the proper county, of a letter of attorney given to convey land lying in this state, which appeared to have been executed in Scotland, and acknowledged before the Lord Provost and chief magistrate of the city of Edinburgh, and so certified by him under the seal thereof, was offered in evidence, and objected to; first, because it was only an exemplification and no proof given of the loss of the original; second, because it was only certified to have been acknowledged, whereas the act of 1715 provided only for its being admitted in evidence upon its being certified to have been proved by one or more of the witnesses thereunto; but the objection that no proof was offered of the seal of the city of Edinburgh, seems not to have occurred or been thought of by any one concerned in the case, although much discussed by those whose competency, as well from ability as from knowledge and experience in the practice of the law will not be questioned. This is not only strong evidence to show that such objection is in contravention of the act of assembly itself, but most powerful to show that in practice it had never been taken or thought of among the profession before the case of *Foster v. Shaw*.

Judgment of nonsuit affirmed.

Cited by Counsel, 4 Wr. 460.

Cited by the Court, 12 Wr. 51.

See Act April 3, 1840, P. L. 233.

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*[PHILADELPHIA, FEBRUARY 15, 1833.]

Fox and Others *against* Winters and Another.

IN ERROR.

Under the act of April 1st, 1811, the Orphans' Court has no power to order sale of the real estate of a testator, until the final settlement of the administration accounts.

But irregularities in the proceedings cannot be inquired into in a collateral suit, if it substantially appear that the accounts were finally settled and confirmed previously to the order of sale.

Nor can the purchaser at such sale be affected by the fraud of the executor in settling his accounts, unless it appear that the purchaser was a party to it or had notice of it before or at the time of the sale.

WRIT of error to the District Court for the city and county of *Philadelphia*, in an action of ejectment for a messuage and two lots of ground in the Northern Liberties of the city of *Philadelphia*, brought by the plaintiffs in error, Joseph Fox and others against the defendants in error, Garret Winters and George Weaver.

The plaintiffs below claimed under the will of Joseph Fox, deceased, and endeavoured to impeach the regularity of proceedings in the Orphans' Court instituted on the application of Frances Fox, executrix of Joseph Fox, for leave to sell the real estate of the decedent, and the validity of the sale made in pursuance of these proceedings, under which the defendants claimed.

A further statement of the facts and the arguments of the counsel is rendered unnecessary by the opinion of the court, which, after argument by *Conard* for the plaintiffs in error, and *Chester* and *Chauncey*, for the defendants in error, was delivered by

ROGERS, J.—The defendants derived title from a proceeding in a case of testacy in the Orphans' Court, under the second section of the act of the 1st of April, 1811.

That act differs from the act of 1794 (which relates to the estates of intestates) in this, that previous to the order of sale, it is required that there should be a final settlement of an administration account in the Orphans' Court. A final settlement contains an exhibit of the personal estate of the testator; and when the executors intend to make it the foundation of an order of sale, there should be an exhibit or schedule of the debts due from the

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estate. This is required, that the court may judge whether there are sufficient effects to pay, and satisfy the balance appearing to be due; and also, that they may be enabled to determine, what part of the real estate it may be necessary to sell for that purpose. The settlement, if done in proper form, is made before the register; and, after due notice, (as is directed in the act of 1794,) it is sent to the Orphans' Court for confirmation and allowance. After confirmation the executor petitions *the court for an order of sale, whose duty it is to refuse the [*175] order, unless there has been a final settlement of an administration account, and unless it appear that there are not sufficient assets to pay and satisfy the balance appearing to be due. The Orphans' Court will take especial care to prevent injury to minors, by ordering so much only to be sold, as will be sufficient to pay the debts, having also a due regard to the interest of all those who may have an interest in the estate. The great difficulty which we have had, is, whether the jurisdiction of the Orphans' Court attached, by a confirmation of an account, such as is required by the act. It must be admitted, that there has been great irregularity in the proceedings, and it is confidently expected, that the several Orphans' Courts of the commonwealth will pay more attention than was formerly considered necessary in this branch of our judicial polity. I have examined the case with attention, and have come to the conclusion (not without great hesitation) that the account exhibited to the register was substantially confirmed by the Orphans' Court. It appears to have found its way into the court, (though in an informal manner,) and was made the foundation of the order of sale. Indeed, the court seems to have taken unusual pains to ascertain the facts necessary to the order. The opposition to the sale proceeded from Mary Elliot, one of the children of Joseph Fox, who are interested under the will of their father in the property, for which the ejectment is brought. On her application the order of sale was suspended, and auditors were appointed to report the facts to the court. They reported the net income of the testator's estate to be ninety-two dollars and twenty cents, and that there was a balance in the hands of the executrix of personal estate, according to the appraisement, as stated in the register's certificate, of two hundred and two dollars. The report of the auditors was confirmed by the court. It is clear, that the account exhibited to the register, was before the auditors, which on examination they found to be correct, and on that basis made their report. There was then a substantial though it must be confessed an informal confirmation of a final settlement of an administration account, so as to give the Or-

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phans' Court jurisdiction of the subject-matter. The court were not content with the report of the auditors, but at the instance, as I suppose, of the heirs, and very properly, they directed the auditors further to inquire whether the debts claimed by the creditors, were justly chargeable to the estate, and that they should furnish the court with the evidence on which they founded their opinion. In pursuance of the order, the auditors made a report of the evidence, and also, that in their opinion, the estate of Joseph Fox, deceased, was chargeable with the payment of the debts, as presented in the schedule from the register's office, amounting to one thousand nine hundred and sixty-eight dollars and twenty-five cents. This report must also have been confirmed, although not noted on the record, for we find that the order of sale is then suffered to go, without further opposition in that court, or an appeal to this. If then [*176] the court had jurisdiction *to order the sale, we cannot now inquire into the irregularities which attended the proceedings. The decree of the Orphans' Court, is conclusive on the subject-matter. Whatever doubts may have existed formerly, there is none now, that when the Orphans' Court have jurisdiction, the decree is conclusive, and cannot be questioned on a collateral suit, unless there is fraud. *Kennedy v. Wachsmuth*, 12 Serg. & Rawle, 171; *M'Fadden v. Geddis*, 17 Serg. & Rawle, 336; *President of the Orphans' Court of Dauphin County for the use of Groff v. Groff*, 14 Serg. & Rawle, 183; *M'Pherson v. Cunliff*, 11 Serg. & Rawle, 422; *M'Lenachan and Wife v. Commonwealth*, 1 Rawle, 357. I had some difficulty on the ground of the notice which is required under the act of 1794, which is the same, whether the person died with or without a will. There cannot, however, I think, be any reasonable doubt, that all the parties had notice. Two of the four children, all of whom were adults, were present before the auditors, and threw every obstacle in the way of the application for the order of sale. We must presume that the court would not decree a sale, without giving every person in interest the opportunity of a hearing. A purchaser at a judicial sale has a right to act on the supposition that the court has done its duty. We have room for the presumption of notice, because a sufficient time elapsed, from the time of filing the accounts in the register's office, viz., the 5th February, 1812, and its confirmation on the 17th June, 1812.

The plaintiffs offered to prove fraud practised by the executrix in settling the accounts. This they attempted to show before the auditors. We think the court were right in rejecting the testimony, unless the plaintiff could further show the participa-

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tion in the fraud by the purchasers, and notice to them, at the time of the sale.

Judgment affirmed.

Cited by Counsel, 6 W. 149; 8 W. 417.
See act February 24, 1834, § 20, P. L. 76.

*[PHILADELPHIA, FEBRUARY 15, 1833.]

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Wintercast and Others *against* Smith.

IN ERROR.

A legacy was left to a married woman, whose husband had deserted her, and from whom she was subsequently divorced from the bonds of matrimony. After the divorce she demanded payment of the legacy, which the executors refused, on the ground that the husband alone was entitled to it, although he had never claimed it, and it was uncertain whether he was dead or living.

Held, that the wife was entitled to recover.

ERROR to the District Court for the City and County of Philadelphia.

Margaret Wintercast the mother of Elizabeth Smith, the plaintiff below, and defendant in error, by her last will dated May 1st, 1827, authorized and empowered her executors to sell her real estate and divide the proceeds equally among her children. Her daughter, Elizabeth, the plaintiff below, was married in the year 1806 to Henry Smith, and had by him five children. In the year 1819, he deserted his wife and family and had not been heard of since. The testatrix died in the year 1828. The defendants below, who were her executors, settled their accounts in the register's office in September, 1829, when it appeared that the balance in their hands for distribution amounted to seven hundred and eleven dollars and fifty-nine cents. In the year 1831, Elizabeth Smith petitioned the Court of Common Pleas of the county of Philadelphia, for a divorce from the bonds of matrimony, on the grounds of adultery and desertion by Henry Smith, and on the 22d October, 1831, the court decreed a divorce according to the prayer of the petition.

Elizabeth Smith claimed payment of the legacy in her own right, and on the refusal of the executors to pay it, the present suit was brought, which the defendants below resisted on the ground that the husband was solely entitled to the legacy.

The cause was tried on the 30th of March, 1832, when a verdict and judgment were given in favour of the plaintiff

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for the sum of one hundred and forty-two dollars and thirty-two cents, being her share of the assets in the hands of the executors: on which a writ of error was taken out by the defendants below.

A bill of exceptions which was taken on the trial came up with the record, and in this court the following errors were specifically assigned:

1. That the court erred in charging the jury that the several matters and proofs given in evidence (set forth in the bill of exceptions) were insufficient to bar the plaintiff of her action, and acquit the defendant thereof.

[*178] *2. That the court below erred in charging the jury that the plaintiff in consequence of the divorce obtained from her husband, Henry Smith, from the bonds of matrimony, on the grounds of adultery and desertion, at a session of the Court of Common Pleas for the city and county of Philadelphia, on the 22d of October, 1831, was entitled to recover in the said action, and to have a verdict in her favour for the sum of one hundred and forty-two dollars and thirty-two cents notwithstanding the sale of the real estate on the 25th of June, 1829, in pursuance of the will of the testatrix, and that the said executors had received the money, the proceeds of the sale, before the plaintiff had obtained the said divorce, and had on the 12th of September, 1829, settled their account of the administration of the said estate, in the register's office at Philadelphia.

After argument by *Keemle* for the plaintiffs in error, and *Armstrong* for the defendant in error, the opinion of the court was delivered by

KENNEDY, J.—This case has been brought up by a writ of error to the judges of the District Court of the city and county of Philadelphia. It is an action on the case commenced there by the defendant in error against the plaintiffs in error, to recover from them one-fifth part of the moneys arising from a sale of the real estate, late of Margaret Wintercast, made by the plaintiffs in error as the executors of the last will of the said Margaret, which she thereby had directed to be sold, and the money arising therefrom to be divided equally among her five children, of whom the defendant in error is one. The plaintiffs in error sold the estate on the 25th day of June, 1829, and on the 12th of September following settled their account in the register's office, exhibiting a balance, after deducting expenses, &c., of seven hundred and eleven dollars and fifty-nine cents remaining in their hands to be divided equally among the five legatees. The defendant in error was married in 1806 to Henry Smith, who lived with her until 1819, when he left her, went

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off and has not been heard of since. On the 22d of October, 1831, the Court of Common Pleas of the city and county of Philadelphia, passed a decree of divorce in her favour, freeing her from the bonds of matrimony, on the grounds of adultery and desertion by her husband.

The only question made on the trial of the cause below was, whether the plaintiff below, or he who had been her husband, was entitled to receive the money. The court decided this question in favour of the plaintiff below, and a verdict and judgment were accordingly given for her. The decision of the court below upon this question was excepted to by the plaintiffs in error and is the only thing that has been assigned for error here.

The counsel for the plaintiffs in error contended that the money arising from the sale of the real estate of the testatrix and given by her in her will to the defendant in error, as one of her children, vested absolutely in the husband before he was divorced from his wife; and that without his authority they would not be safe in paying the *money to her. The [*179] case of *Griswald v. Penniman*, 2 Conn. 564, has been cited, and principally relied on, as an authority deciding the question in favour of their position. The only difference between that case and the one under consideration is, that it was a distributive share of an intestate's estate that was claimed there, and here it is a share of a testator's estate given by her will, that is claimed. I am not satisfied that any distinction ought to be made between the two cases on this ground. In *Griswald v. Penniman*, the court decided that the administrators of a husband who died in the lifetime of his wife were entitled to the wife's distributive share of her father's personal estate who died in the lifetime of the husband. They say, that such distributive share vested absolutely in the husband immediately upon the death of his wife's father: That he might have maintained a suit for it in his own name alone, had he lived, and that that being the case, it must therefore be considered as having vested in him absolutely, and upon his death as passing to his personal representatives. Now I conceive that it does not at all follow, that because a husband may maintain an action exclusively in his own name for a chose in action, that he must necessarily be vested with an absolute and unconditional right to it. For there are many cases in which he may maintain an action without joining his wife, for a cause with which he is invested in right of his wife, and where it has accrued through and by means of her during the coverture, in which the right will most undoubtedly survive to her upon his dying without having brought a suit, or having extinguished the right in any

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way. In the case of a trespass committed during the coverture upon a freehold real estate, or estate of inheritance, which he holds in right of his wife, he may support an action for it in his own name alone. 1 Rolle Abr. 347, l. 40, or in the name of himself and wife jointly. Ib. 348, l. 18. And in case of his death without having prosecuted such a suit to judgment, the cause of action survives to his wife and she may maintain it. Ib. 349, l. 29, so in the case of Howell v. Maine, 3 Lev. 403, it was held that the husband might support an action in his own name alone, upon an obligation which had been given to his wife *dum sola*. Yet all the authorities concur in saying that they may join in bringing such an action. Indeed, in Fenner v. Plasket, Moore, 422, it is said that they must join; which is repeated in 2 Wils. 423. And if the husband should die without having recovered or received the amount of such obligation, the right to sue on it, it is admitted in all the cases on this subject, would survive to the wife if she be living at the time of his death.

If a bond be made to husband and wife jointly, during the coverture, the husband may sustain a suit upon it in his own name alone, or join his wife with him at his pleasure. Hilliard and Wife v. Humbridge, Allyn, 36; s. c. Styles, 9; Litt. Rep. 13. See also Aleberry v. Walby, 1 Stra. 229. But if the husband die without bringing a suit, the wife surviving, she will [*180] succeed to the right of *action upon the bond by survivorship. Nothing but some positive act upon the part of the husband in his lifetime, showing his disagreement to her right in the bond, will exclude the wife after his death; such, for instance, as bringing a suit on it in his own name alone; for if he join her name, and die pending the suit, it will survive to her. Coppen v. ———, 2 P. Wms. 497. The propriety of the husband and wife's joining as plaintiffs in an action, does not, as I apprehend, depend solely upon the contract, out of which the cause of action arises, having been made before or after the marriage. For though they may perhaps join in all cases where the contract was entered into with the wife *dum sola*, yet in cases of contract after the marriage, wherever she is the meritorious cause and moving consideration of it, they may also join: and the cause of action will survive to the wife upon his dying in her lifetime without having done any act to exclude her. As in the case of a promise made to the wife for the cure of a wound or disease performed by her by the exercise of her skill during the coverture. Shipston v. Booler, 1 Sid. 25; Fountain v. Smith, 2 Sid. 128; Brashford v. Buckingham *et ux.*, Cro. Jac. 77; s. c. Ib. 205, and in this last case it is said expressly, that such cause of action would survive to the wife. Rose and Wife v. Bowler, 1 Hen. Bl. Rep. 114; Weller *et al.* v. Baker, 2 Wils.

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414. And in *Lodge v. Hamilton*, 2 Serg. & Rawle, 493, it was ruled by this court, that a recognizance taken in the Orphans' Court to the husband and wife to secure the payment of the wife's share of the valuation money of a tract of land, of which her father died seized in fee, survived to her upon the death of her husband; and that the money did not belong to his administrators. And the late Chief Justice Tilghman, who delivered the opinion of the court, says, "The general rule is, that the choses in action of the wife survive to her, unless the husband had reduced them into possession or assigned or released them during the coverture. And the same rule prevails where the husband and wife jointly become entitled to a chose in action during the coverture."

The counsel in the case of *Griswald v. Penniman*, seems to have considered the case of *Carey v. Taylor*, 2 Vern. 302, as directly in point. In this, however, I think there was a misapprehension of that case; for the husband there survived the wife, and would have been entitled to all the wife's personal estate, including her choses in action, as next of kin, under the statute of distributions, if upon no other ground. See *Squib v. Wyn*, 1 P. Wms. 380; *Cart v. Rees*, Ib. 381, 382; *Humphreys v. Bullen*, 1 Atk. 458; *Elliot v. Collier et ux.*, 1 Wils. 168; s. c. 3 Atk. 526, and Mr. Butler's note (1) to Co. Lit. 351, a. The question of survivorship could not have arisen. But the case appears from Mr. Raithby's note to it, in which he has given an extract from the decree itself, to have been decided in favour of the husband's personal representatives exclusively on the ground of his title to it growing out of the terms of a marriage settlement which had been made.

The case of *Shuttlesworth v. Noy*, 8 Mass. 229, was also relied on *there, and has been cited here, but the question did not arise in that case and was not decided by the court. [*181] The husband and wife were then still both living; and the court only decided that the money due upon a note given payable to the wife during the coverture might be attached by the creditors of the husband; because, as they say, "a note made payable to a *feme covert* is legally payable to the husband," to which is superadded, what was certainly not necessary to or connected with the decision of the case, that "after the husband's death, it would go to his executor or administrator and not to the wife." This point not arising in the cause, could not have been argued, and must be regarded as an *obiter dictum* thrown out without due deliberation; which is repudiated by the decision of that same court and the doctrine and principles laid down by it in *Draper v. Jackson and Wife*, in 16 Mass. 480. In this case it was held, that a note and mortgage made to husband and wife,

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to secure the payment of the price of a tract of land belonging to the wife, which they had sold and conveyed to the drawer of the note, survived to the wife upon the husband's dying without having done anything with either; and that the money did not belong to his administrator. The subject appears to have received a very full consideration; and a very elaborate opinion was delivered by Mr. Justice Jackson, in which he has referred to and reviewed many of the ancient authorities relating to it.

To the authorities already referred to, which show that where the wife is the meritorious or moving cause and consideration for a promise, note, bond, or recognizance made to her during the coverture, or to her and the husband jointly, that it will survive to the wife unless the husband in his lifetime has done some act to exclude her, may be added, *Nash v. Nash*, 2 Madd. 133 (Eng. Ed.) but 411 (Amer. Ed.) where a father after the marriage of his daughter drew a check in her favour upon his bankers for ten thousand pounds; the bankers gave her a promissory note for the ten thousand pounds. Afterwards one thousand pounds, part of the principal of the note, was paid to the husband, who also received the interest as it became due upon the note up to the time of his death. It was held upon his death, that his wife who survived him was entitled to the note as a chose in action which had survived to her. In *Day v. Pasgrave*, 2 Maule & Selw. 396, note 6, where the plaintiff as administrator of his wife, brought debt on a bond given to her during the coverture; and on demurrer to the declaration, it was objected, the action should have been brought by the husband in his own right and not as administrator, because the wife never had any sole right of action in her. But the plaintiff had judgment on the ground that the right to the bond would have survived to the wife if she had outlived her husband. And in *Philliskirk v. Pluckwell*, 3 Maule & Selw. 396, the question was made, whether husband and wife may sustain a suit upon a promissory note made to the wife during the coverture? Id. Ellenborough was of opinion that they might, and says that "In Co. Lit. 120, a; 1 Roll. [*182] *Abr. Baron & Femme, H. Pl. 6 and 7, a difference is taken between a thing that is not merely a chose in action and one that is; and therefore in the case of a bond made to the wife, if the wife dieth the husband shall not have it without taking administration, because that is merely a chose in action; so here the note is made to the wife; and it imports a consideration unless the contrary be shown." Mr. Justice Dampier concurred in this opinion.

The cases of *Lightbourn v. Holiday*, 2 Eq. Abr. 1, pl. 5, and *Hodges v. Beverly*, Bunb. 188, may now be considered as entirely overruled; where in the first, a promissory note given to

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the wife during marriage for the payment of money, and in the latter case, an accountable receipt given for money to her also during the marriage, were held not to survive to the wives upon the deaths of their respective husbands.

These late cases are also in accordance with what is said to be the law in our most ancient books of authority. See Fitz. Abr. tit. Brief, 19, where in an action of debt on a bond made to the husband and wife, in which both had joined, it was objected, that the action should have been brought by the husband alone; but Babbington, Chief Justice, said it might be brought in either way. This proposition is laid down again and repeated in Bro. Abr. tit. Baron and Feme, pl. 50 and 60. And in 1 Danv. Abr. 715, this proposition is stated, that if an obligation is made to husband and wife, the wife shall have it by survivorship; for which is cited 43 Ed. 3, 10, and 4 Hen. 6, 6, and adds, "M. 6 Jac. B. C. adjudged upon demurrer. Tr. 10 Car. in Cane. Seaccarii, between Spark and Fairemanner, adjudged in a writ of error." See same in Vin. Abr. tit. Baron & Femme (B. a. pl. 1).

In *Christ's Hospital v. Budgin & ux.*, when the husband had lent out money in the names of himself and his wife upon mortgages and bonds, and died, leaving his wife surviving, it was decreed that she was entitled to the money by survivorship, unless so far as it might be wanted to pay the debts of the husband. 2 Vern. 683.

I am also inclined to believe that the distributive portions or shares of the personal estates of intestates ever have and must still be looked upon as choses in action, until recovered, or reduced to actual possession by those entitled to receive them.

A portion due to an orphan in the hands of the chamberlain of London, was decided to belong to the orphan who survived her husband. *Pheasant v. Pheasant*, 1 Chan. Ca. 181; s. c. 2 Ventr. 341. But if the husband survive the wife he will be entitled to it. *Fouke v. Lewen*, 1 Vern. 88. The statute of distributions has been likened to a will in its effect, and the portions arising under it to legacies. In *Brown v. Shore*, 1 Show. 26, Lord Holt, C. J., in speaking of this act says, "it is the same as if the party had made his will to this effect; the common case of a residuary legatee, who dies before probate, his executor shall have administration, and not the next of kin to the testator; that proves this case. A right of action or chose in action will go to executors." The question in the case was whether the *act of distribution vested an interest immediately in [*183] the distributees upon the death of the intestate, so that if they or any of them died before the distribution made, the portions or shares of such dying should go to his or their respec-

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tive executors, or to the next of kin to the intestate in being at the time of distribution made. It was ruled that the personal estate of the intestate vested in his next of kin *eo instanti* that he died. Considering the portions of the intestate's estate given by the statute as vested legacies and choses in action that would pass to the executors or administrators of such distributees as might happen to die before they had received their respective shares. Eyres, Justice, in the same case says, "the design of the statute was to make a will for the intestate."

With respect to legacies, I think they have been almost uniformly regarded as choses in action; and when given to a married woman, will, unless received, released, or perhaps assigned for a valuable consideration by the husband, survive to her upon his dying before her. I am not aware of any case which contradicts this, except an anonymous one in 2 Rolle's Rep. 124, where it is stated, that a legacy of ten pounds was bequeathed to a *feme covert*, to be paid eighteen months after the death of the devisor; during the eighteen months the wife died, and administration was granted to her daughter. Montague, Justice, said, the ten pounds did not belong to the daughter; that the husband had an interest in it before the time of payment accrued, and could have released it before it became payable. No authority is cited for this dictum or decision if it may be so called; and the reason assigned for it, that the husband could have released it in the lifetime of his wife before it became payable, is certainly very inconclusive; because in all the cases already referred to, where it has been held that the right and the cause of action survived to the wife, the husband could have released and extinguished the right.

In *Nanney v. Martin*, where a legacy of three hundred pounds and other moneys were given by the will to the wife before marriage, and upon a bill filed by the husband and wife a decree was made in their favour for the payment thereof when the husband died; it was held that the wife was entitled to the amount of the decree by survivorship. 1 Chan. Rep. 124; s. c. 1 Chan. Ca. 27. In *Garforth v. Bradley*, 2 Ves. 676-7. The wife during coverture by the will of her mother became entitled to a legacy, and also to a part of the residue of the testatrix's estate which had been bequeathed to another legatee who died in the lifetime of the testatrix. The wife survived her husband and died: And the question was, whether these bequests belonged to the representatives of the husband or of the wife. There had also been a marriage settlement. Lord Hardwicke said, "the question would depend entirely on the construction of it, and the covenants contained therein, for as to the general question it would certainly survive to the wife, if nothing by

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way of contract attended *the case; for wherever a chose in action comes to the wife, whether vesting before or after the marriage, it will survive to the wife; with this distinction, that as to those which come during the coverture, the husband may for them bring the action in his own name, may disagree to the interest of the wife; and that recovering in his own name is equal to reducing into possession." In the case of *Blount v. Bestland*, 5 Ves. 515, a legacy of six hundred pounds was bequeathed to the wife during marriage, and after it became payable the husband agreed with the executrix that she need not call in certain moneys due upon a mortgage with which the executrix said she intended to pay the legacy, but that it might remain, upon the interest being paid to him, until he should want the principal, and he accordingly received upon it afterwards two half years' interest, disposed of the principal by his will and then died. The Lord Chancellor declared the legacy to be in effect a chose in action which could only have been obtained by suit, to which the wife must have been made a party and that it survived to her.

In *Brotherow v. Hood*, Comyn's Rep. 725, a legacy of sixty pounds bequeathed to the wife, who married, and the husband dying before it became payable, was held to be a chose in action, which survived to the wife.

In *Wildman v. Wildman*, where a married woman became entitled as next of kin of an intestate to the sum of thirteen thousand three hundred and thirty-three pounds six shillings and eight pence, three per cent consolidated annuities, which was transferred by the administrator into her name to her sole and separate use; and the husband dying without having exercised any act of control or ownership over it, it was adjudged that it survived to the wife. 9 Ves. 174.

The right of the wife to receive legacies by survivorship, where they had been given to her during marriage, has been held not to be affected or barred by the husband's becoming bankrupt or insolvent, and the consequent assignment of all his property for the benefit of his creditors, where he dies leaving his wife surviving, before the assignees shall have received payment, although they may exhibit a bill to compel it. See *Pierce v. Thornley*, 2 Sim. 167, and *Gayner v. Wilkinson*, Dick. 491.

That the legacy in question is a chose in action, has in effect been decided, as I conceive, by this court, in the case of *Morrow v. Brenizer*, 2 Rawle, 185, where the testator had directed his real estate, as in this case, to be sold by his executors, and the moneys arising therefrom to be equally divided among his children, but before a sale was effected by the executors, a judicial

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sale of all the right and interest of one of the children in the estate was made by the sheriff under a judgment against him; and held that nothing passed by it to the purchaser. This goes to show that the legatee against whom the judgment and execution were had and issued, had no right of property in the land sold thereon, and which was directed by the will to be sold by the executors for his benefit and that of others. That his claim [*185] *under the will was to money which was to be raised out of the land by a sale of it: that it was in the nature of a chose in action and therefore not the subject of an execution. Neither could his proportion of the money produced from a sale of the land afterwards made by the executors under the will have been levied on as his property before it was paid over to him, because admitting that money may be taken in execution, (see the *King v. Webb*, 2 Show, 166, and *Francis v. Nash*, Ca. Temp. Hardw, 53,) still it could not be considered his property for that purpose until received. Upon this principle, it has, as I take it, ever been held, that a sheriff who has in his hands two writs of *fiери facias*, one against and the other in favour of the same person, and collects the money upon the *fiери facias* in his favour, but can find nothing upon which to levy the amount of the other against him, cannot levy it out of money which he has collected, because it is not considered the specific property of the party plaintiff in the execution upon which it was made, until it is paid over to him by the sheriff. *Armistead v. Philpot*, Doug. 231; *Turner v. Fendall*, 1 Cranch, 117.

In every view which can be taken of the legacy in question, it appears to me that it must be considered as a mere chose in action, and as the husband has never made any claim to it, and is now debarred from doing so by the divorce, which has dissolved the ties of matrimony between the defendant in error and him, the judgment of the court below was right and is therefore affirmed.

Judgment affirmed.

Cited by Counsel, 3 Wh. 417; 5 Wh. 141; 8 W. 11, 412, 505; 10 W. 56; 3 W. & S. 230; 6 W. & S. 297; 1 Barr, 293; 2 Barr, 72; 4 Barr, 391; 7 Barr, 448; 10 Barr, 374; 4 H. 392; 9 H. 249; 7 S. 354; 15 S. 398; 13 W. N. C. 420.

Cited by the Court, and approved, 6 W. 132.

[PHILADELPHIA, FEBRUARY 15, 1833.]

Sylvester *against* Girard.

IN ERROR.

By the act of March 22d, 1817, entitled "An act to prevent the making, issuing, receiving, and circulating certain descriptions of notes and tickets in the nature of bank notes, and for other purposes," a note in the nature of a bank note issued by an individual, is valid so far as to compel the drawer to discharge it, and is consequently the subject of property in the holder, and if stolen from him, it is the subject of larceny.

In an action of trover by the holder of such a note against the drawer, who had got possession of it and refused to return it on the ground that it did not belong to the holder, it is not necessary for the defendant to give notice to the plaintiff, before the trial, that he must prove his property in the note. The plea of not guilty in trover, requires the plaintiff fully to make out his case.

If such a note has been delivered to the plaintiff for the mere purpose of getting it exchanged, no property passes to him, and the circumstances of his being a creditor of the person delivering it, if no receipt or other acknowledgment of credit on the old debt be given at the time, does not alter the case.

Quere, whether a promissory note given for a consideration partly legal and partly illegal, is valid for so much as is legal?

WRIT of error to the District Court for the city and county of *Philadelphia*, in an action of trover brought by Nathaniel Sylvester **against* Stephen Girard for a promissory note [*186] in the following form :

C.

Stephen Girard.

"1009 C. No. 353. No. 353. 1000.

I promise to pay to M. Gebler, or bearer, One Thousand Dollars, on demand, at my Banking-house in South Third Street. Philadelphia, May 3, 1827.

Stephen Girard.

STEPHN. GIRARD."

"J ROBERTS, Cashier."

[Indorsed] "*M. Gebler.*"

The defendant pleaded not guilty.

On the trial of the cause in the District Court, it appeared, that one William Clew, a porter in the service of the Bank of the United States had stolen the note in question from that institution. Being at the time indebted to the plaintiff, who kept a lottery office, in the sum of nine hundred and twenty-eight dollars and sixty-four cents, on account of the purchase from time to time, of various lottery tickets of some of which, the

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sale in this state was prohibited by law, and for the whole of which the plaintiff then held his note payable on demand, he offered to him the above-mentioned note of Stephen Girard in satisfaction of the debt, and requested his check for the balance. The plaintiff took Girard's note, but alleging that it would disorder his bank account to comply with Clew's request, declined giving his own check for the balance, saying, he would get Girard's note changed and then pay him the balance. Clew left the note with the plaintiff and did not take up his own note, nor did he receive any credit on it.

In the meantime, the Bank of the United States, having discovered the loss of the note, sent notices to the different city banks, and requested them to stop it, if it should be presented.

Sylvester called at the Mechanics' Bank, which was the nearest to his own office, for the purpose of getting Girard's note changed. He was there informed of the notice received from the Bank of the United States and that the Mechanics' Bank could not receive the note. On being asked from whom he had received it, he declined disclosing the name of the person, but said he was a responsible man.

On his return to his office, Clew, who had remained there, told him he had found this note, and another of Girard's notes of like amount.

Sylvester then called at the Bank of the United States, and afterwards on Girard, without obtaining payment of the note. On the next day he put it into the hands of a notary public, who presented it to Girard, and demanded payment. This was refused, and the note itself, which had been delivered to him by the notary, for examination, was detained, whereupon the notary made a protest, that at the request of N. Sylvester, he had presented the original promissory note "at the banking-house of [*187] Stephen Girard, Esq., *in South Third street, unto Mr. Girard the drawer, and Mr. Roberts, his cashier, they both being together, and demanding payment of the same, I received for answer, that he refuses to pay, and retains the said note, at the request of the Bank of the United States: wherefore, I, the said notary, was unable to obtain payment or a return of the said note." The notary, therefore protests, in the usual form, against the drawer, and all others concerned, for all damages, &c., for want of payment thereof, as well as for the detention of the same.

On the trial, an objection was made by the plaintiff's counsel to the admission of evidence tending to impeach the title of the plaintiff to the note. The judge admitted the evidence, and an exception was taken to his opinion. Exception was also taken

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to the whole of his charge to the jury, which the opinion given by this court renders it unnecessary here to insert.

A verdict and judgment having been given for the defendant, the present writ of error was taken out, and the following specification of errors filed in this court:

1. The court erred in admitting evidence to show that the Bank of the United States had lost the note in question, the said note having been issued and received in violation of an act of assembly, and for receiving which, the Bank of the United States was subject to a penalty.

2. The court erred in the admission of evidence to show that the consideration given by the plaintiff to Clew for the note for which the action was brought, consisted, as the defendant alleged, of a debt due for lottery tickets; no notice having been given to the plaintiff to prove the consideration.

3. The charge of the court was erroneous in this particular, that the judge charged the jury, that it was competent to the defendant to show for what consideration a certain promissory note, drawn by Clew, and held by the plaintiff, had been given; and that if illegal lottery tickets, that is, such as could not by law be vended in Pennsylvania, formed any part of the consideration of that note, the whole was void.

In support of the first specification of error, *Randall and Scott* contended that by the act of the 22d of March, 1817, entitled, "an act to prevent the making, issuing, receiving, and circulating, certain descriptions of notes and tickets, in the nature of bank notes, and for other purposes," *Purd. Dig.* 96-97, the Bank of the United States could not be the lawful proprietors of the note in question, it having been issued by Girard, in violation of the provisions of that act.

As to the second specification of error, they alleged that the plaintiff had a right to notice from the defendant, that he would be required to prove the consideration given for the note. Property in mercantile paper of this description, passes by delivery. A note payable to bearer, is payable to him in the quality of bearer; he is not *required, *prima facie*, to go [*188] further than to show his possession. If the defendant be entitled to enter into an inquiry as to the plaintiff's right of possession, it can only be done on reasonable notice to him. If the rule were otherwise, he would be taken by surprise. *Chitty on Bills*, 148, 400, 411; 4 *Taunt*, 114; *Latimer v. Hodgdon*, 5 *Serg. & Rawle*, 514; *Grant v. Vaughan*, 3 *Burr.* 1516; 2 *Camp.* 5; *Lowndes et al.* assignees of *Lees v. Anderson et al.*, 13 *East.* 134.

In arguing the third specification of error, they contended,

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that if the consideration of the note given by Clew to the plaintiff was good in any part, the note was not avoided by reason of its embracing a defective consideration also. The plaintiff's property in Girard's note was in no degree affected by the soundness or unsoundness of Clew's note to him. The plaintiff was entitled to the possession of Girard's note, stopped and detained from him against his consent by the defendant, which in law amounted to a conversion, or to damages for the detention. *Miller v. Race*, 1 Burr. 452; *Faikney v. Reynous* and another, 4 Burr. 2069; *Petrie et al. exs. of Keeble v. Hannay*, 3 D. & E. 418; *Touteng and another v. Hubbard*, 3 Bos. & Pull. 295; *Barjeau v. Walmsley*, 2 Str. 1249.

Binney and Chauncey for the Bank of the United States (the real defendants, Girard being ready to pay the amount of his note to any person entitled to receive it) argued that the case did not come within the act of March 22d, 1817, the second section of which recognises the right of individuals established for the purpose of banking, to issue such notes as that in question. This section embraces the case of Mr. Girard, who, when the act was passed had been for some time an established banker; and the seventh section of the same act gave to the Bank of the United States, which was the legal proprietor of the note, the exclusive right to recover from the drawer. *Hess v. Werks*, 4 Serg. & Rawle, 356.

In answer to the second specification of error, they contended that the plea of not guilty, the general issue in trover, puts the plaintiff to the proof of everything necessary to make out his title to the chattel which is the subject of the suit; no notice therefore is necessary. *Tid. Pr.* 702; *Chitty Pl.* 89, 511; 2 *Taunt.* 2; 2 *Esp. Ca.* 611; 3 *Stark.* 1504; 11 *Johns. R.* 529; 13 *Johns. R.* 92; 14 *Johns. R.* 128.

With respect to the third error assigned, they said, they considered the charge of the court as misunderstood. It amounted in substance to this, that if unlawful lottery tickets were to any extent the consideration of Clew's note to Sylvester, the latter must show from other sources than the note itself, that a part of the consideration was lawful, although it was admitted that the judge had expressed an opinion that the illegality of part of the consideration contaminated the whole instrument. They referred to *Yundt v. Roberts*, 5 Serg. & Rawle, 139; *Wheeler v. Russell*, 17 Mass. R. 258; 3 *Taunt.* 226; 3 *Bar. & Ald.* 181. [*189] They also contended, that Girard's note was *only delivered by Clew to the plaintiff for the purpose of getting it changed; that no property in it passed to him, and that therefore he could not maintain an action for it in his own name.

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The opinion of the court was delivered by

HUSTON, J.—By the second section of the act of 1817, this note of Stephen Girard, admitting him to be within the prohibitory clause, which I do not admit, would have been illegal, and no suit for the recovery on it could have been supported; and if so, this suit would be a useless contest about the right to that which was worthless.

Admit, however, that generally no suit can be supported on a note or writing, which the law forbids any person to make or issue under a penalty, yet it was competent to the legislature to enact otherwise, and expressly to declare, that although it was forbidden to make, issue, or receive any such note, and a penalty was inflicted on those who violated its provisions, yet the note when issued and received, should be available to enable the person who had received it, to sue for and recover the amount due on the face of the note, from the individual or bank who made it, and by the 7th section this was done; and this section made the note valuable, the subject of a suit, and of larceny, as if the act declaring such notes not the subject of a suit, or of larceny was repealed.

The fallacy consists in arguing this case as if the seventh section were not in existence; as if the law of this case depended on the general law, or the thirteenth section of the act of 1814 which are repealed, and were not to be decided by the provisions expressly made to govern it.

These notes are then property, subjects of larceny, and being so, are, when stolen, subject to all the incidents of other stolen property; that is, they can be recovered from the thief, or receiver of the theft, with knowledge of the theft, and of course, payment may be stopped when demanded by the thief, or any person acting as his agent, or who received it with notice that the note was stolen.

As to not having given notice to prove ownership, this objection is taken without due reflection. The form of action adopted by the plaintiff made it necessary for him to prove his right to the note; to have given him notice to prove his right would be not only idle, but absurd, and the more so, in this case, because Mr. Girard, when the note was presented to him, told the plaintiff, "this note belongs to the Bank of the United States, it was stolen from them, they have given me notice to stop the payment of it; I will not pay or return it to you because you are not the owner." On this the plaintiff might still have sued for the amount of the note, or might sue to recover the possession of the note, and he chose the latter. The suit then was brought, and the form of action selected to try who was the owner of the

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note. On this ground no usage, no precedent, is produced of any such notice to a plaintiff in trover. Besides, the defendant does not ask the plaintiff to prove anything. Under his plea [*190] he can by *law defeat the plaintiff by showing title in himself, or a third person, and either will equally defeat the plaintiff's recovery. 3 Starkie, 1504; 14 Johns. 128; 11 Johns. 529.

When the holder of a note sues for the amount due on it, and the defendant pleads that he did not assume to pay it, the plaintiff has no notice that his right to the note will be disputed; but when he presents a note to the maker who retains it, and says, "I will retain it, because it is not your property, but that of another person from whom it was stolen," and on this the holder selects to try the very question whether he has a good right to the note or not, he cannot be surprised on the above ground, for he must be nonsuited unless he shows a right to the possession of the note. The third exception is on a point which did not arise in the cause. If the plaintiff had delivered to Clew his note of nine hundred and twenty-eight dollars and sixty-four cents on receiving this one thousand dollar note, or if the plaintiff on receiving the note in question, had, according to his statement of what was intended, entered a credit on that note before he was informed of the theft, a question might have arisen on which it seems different opinions have existed. But nothing like this occurred. The plaintiff neither gave any present consideration for the note, nor credit on any past debt; before either had occurred, he was told it was a stolen note. It would then be a waste of time for this court to enter into the discussion of whether a note was void in whole or in part, when that note or its validity or invalidity can have no effect in this cause, and could not have had any effect unless there was some colour of proof that the nine hundred and twenty-eight dollar note of Clew had been given up in consideration of the note in question.

If Clew had proposed to buy a horse, and the owner went to get change for this one thousand dollar note, and had been told it was stolen, and returned and kept his horse, how could he say he had given a valuable consideration for the note, or any consideration at all?

It occurs too often in this state, that matters having but little connection with the cause, and therefore not much attended to by the judge, are made the subject of assignment of error and reversal of the judgment, and this has often been found a great evil. If, however, the matter has a bearing on the point trying, it must be considered on error brought; but it would be

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too much to reverse for what, on all that appears before us, has no more connection with this case than any other case in court.

Judgment affirmed.

Cited by Counsel, 5 Wh. 368; 2 W. & S. 236; 3 Wr. 524; 18 S. 222; 7 W. N. C. 493.

*[PHILADELPHIA, FEBRUARY 15, 1833.]

[*191]

Case of the Germantown and Perkiomen Turnpike Road Company.

A conditional report of viewers appointed to assess damages in a road case, finding facts, but submitting to the court questions of law arising upon them, is bad.

CERTIORARI to the Court of Quarter Sessions of the County of *Philadelphia*.

A wide range of argument upon certain local acts of assembly was taken by *Chew* for the Germantown and Perkiomen Turnpike Road Company, and by *Page* for the commissioners of the county of Philadelphia; but the opinion of the court (delivered by the Chief Justice) being confined to a single point, it becomes unnecessary to report the arguments.

PER CURIAM.—The quarter sessions very properly quashed the report, inasmuch as the viewers had not power to report conditionally, or, as in the case of a special verdict, to reserve the matters of law for the determination of the court. They were bound to dispose, in the first instance, of all the matters committed to them, whether constituted of law or of fact, subject however to review by the sessions. It would be improper to anticipate a question which may arise hereafter, whether the rights of the company have been assumed by the district, or whether the corporate owner of a franchise, is a subject for compensation under the general road law. That question may come up on another report, and we restrict ourselves to the ground on which the judgment of the court is clearly sustainable.*

Order of the Quarter Sessions affirmed.

* See 2 Serg. & Rawle, 277.

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*[PHILADELPHIA, FEBRUARY 15, 1833.]

Case of Spring Garden Street.

CERTIORARI.

The Presidents of the Courts of Quarter Sessions are not required by the act of the 24th of February, 1806, to reduce their opinions to writing, and file the same of record.

The act of the 23d of April, 1829, directing that "Spring Garden Street, as now laid down and confirmed by the Court of Quarter Sessions of the City and County of Philadelphia, west of Tenth street, be continued of the same width from Tenth to Sixth streets," does not lay out a new and independent street, but is merely an amendment of the plan of the District of Spring Garden, as authorized by the act of incorporation, and confirmed by the court, and leaves the act of incorporation in force as regards the rights and remedies of the parties.

It is no objection to the report of viewers appointed to assess damages for opening a street, that they conversed with the owners of property adjoining, in the absence of the parties interested.

This court will not, on a *certiorari* to the Quarter Sessions to remove the proceedings in a road case, enter into the merits or determine facts.

THIS was a *certiorari* to the Court of Quarter Sessions of Philadelphia county, to bring up the proceedings of the court and jury assessing damages on opening Spring Garden street, in the District of Spring Garden, from Tenth to Sixth street.

A rule to show cause why a *mandamus* should not issue to compel the president judge of the Court of Quarter Sessions to file his opinion of record, that the same might be brought into review before this court, was moved for on behalf of A. L. Pennock.

Biddle and *Chauncey* endeavoured to sustain the rule, under the act of the 24th of February, 1806, section twenty-fifth, requiring the "presidents of the Courts of Common Pleas," &c., to reduce their opinions to writing and file the same of record. It was argued that as the same judge by the constitution of the state presided in both the Common Pleas and Quarter Sessions, the law was obligatory on him, when sitting in either court.

Price, for the District of Spring Garden, was stopped by the court.

BY THE COURT.—We find this law productive of much inconvenience in practice, and as the benefits expected from it have not been realized, we are not inclined to extend its operation by a liberal construction. It does not in its terms embrace the

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president of the Court of Quarter Sessions, and we are not disposed to carry it beyond its terms. The rule is denied.

The first exception taken to the proceedings below was, that the court had no jurisdiction.

Spring Garden street from Tenth to Sixth street, was laid down by authority of the third section of the act of 23d of April, 1829, in these terms: "That Spring Garden street, as now laid down, and confirmed by the Court of Quarter Sessions of the city and county *of Philadelphia, west of Tenth street, be continued of the same width from Tenth to Sixth street." [*193]

Biddle and *Chauncey* contended, that this act was unconstitutional and void, because it took away the property of the citizen, without providing compensation therefor.

Price argued, that it had relation to the plan of the district of Spring Garden, authorized by the act of incorporation: that it was to restore to the plan, a street that had been obliterated by an order of court; and that the ordinary proceedings for the assessment of damages to owners whose property was to be taken for streets, were to be had in the case of this street, as if it had been laid down on the plan by the surveyor of the district. It was to be construed according to its purpose, and as a part of a system of laws for laying out the town plot of Spring Garden.

The court ordered the argument to proceed as to the remaining exceptions, to wit:

That the viewers conversed with owners of property adjoining, and others interested, in the absence of the parties and their counsel, and were influenced by such conversations: That they acted under the impression that Mr. Pennock had no title to the said land, and gave him no damages; and the court below erred in the same respect, and confirmed the report.

Biddle and *Chauncey* for the appellant.—The jury were guilty of undue practices, within the ninth rule of the court, in receiving improper evidence, from interested sources, not under oath, and in the absence of Mr. Pennock. The jury is required to be under oath, and the testimony should be under oath. The act of 1705 does not require referees to be sworn, yet it is the practice, and they must hear testimony in the presence of the parties. The province of the jury is judicial; there are parties, and large amounts of property at stake. Is it to act without principle or restriction? No tribunal of justice, can be safely allowed to seek information at large; and it is a fundamental principle of administering justice in every forum, to hear evidence in the presence of the parties. An undue practice, is any

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departure from correct practice; and what is not right should be corrected by the court. There was error also in law; the title of Mr. Pennock was mistaken. This property was not dedicated to public use by the deed of partition. If there was a dedication for a canal, it was conditional that the canal should come there, which it never did.

T. Sergeant, for the county commissioners, and *J. R. Ingersoll*, for the owners on the street.—This court will not go into general matters heard before the jury. The superintendence of this court is to be exercised only in two cases, “fraud, or undue practice,” which imply something morally wrong, which has not been imputed to this jury. Case of the Road from Penn’s [*194] Grove to the Concord Road, 4 Yeates, *372. Case of the Schuylkill Falls Road, 2 Binn. 250. When the court have departed from this rule, it has been to support the record.

The persons appointed are not strictly a jury, but viewers. They are at liberty honestly to investigate all matters, and to derive their information from what sources they please to inform their judgment. Opinions are almost entirely speculative, as to the value of property, and the advantages or disadvantages to result from opening the street. The jury are not sworn to find according to the evidence, as common juries are; they have no judge or sheriff to decide upon the legality of the evidence offered; they are not even authorized to administer an oath, and may, and do, hear the statements of the parties themselves. They are not kept together as other juries; they go out to view the ground, and adjourn from time to time, according to convenience. If error or injustice takes place, it is subject to correction by the court below.

If Mr. Pennock had no title he cannot be heard. He threw this ground out for a street and canal by the deed of partition, and he was bound by this act, and could not resume what he had so dedicated. If two or more lay out a street, neither can afterwards shut it up, or claim damages for it from the public.

PER CURIAM.—The Quarter Sessions had undoubted jurisdiction. The object of the legislature was to amend the plan as confirmed, leaving the existing law in force as regards the rights and remedies of the parties; not to lay out a new and independent street. As to the objection that the viewers conversed with the owners of property adjoining, in the absence of the parties interested, we see nothing wrong in that. An inquest of this sort is restrained to no peculiar species of evidence, and may resort to any source of information which the members of it

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may think proper—even the evidence of their senses. The subject of the remaining exception, is not properly within our cognizance. We are restrained not only by the decision in the Schuylkill Falls Road, 2 Binney, 250, and the Road from Penn's Grove to Concord, 4 Yeates, 372, but by our own rule, from entering, in cases of this kind, into the merits, or determining facts on depositions; and whatever we may think of the justice of the report, it can have no influence on our judgment as to the regularity of the proceedings.

Proceedings affirmed.

Cited by Counsel, 2 Wh. 394; 3 W. 293; 5 Barr, 206; 2 C. 239; 4 S. 355; 2 W. N. C. 662.

Cited by the Court, 6 Wh. 41; 1 W. & S. 263; 1 H. 385.

*[PHILADELPHIA, FEBRUARY 15, 1833.]

[*195]

Newbold *against* Wright and Shelton.*

IN ERROR.

The withdrawal of material facts from the jury is error.

A factor cannot pledge the goods of his principal for his own debt.

A usage cannot be set up in opposition to a general rule of law; therefore, a usage for factors to pledge the goods of their principals, is bad.

A supercargo, to whom various shipments have been consigned by the same vessel, with instructions from one of the shippers to obtain an advance on his goods, cannot make a general deposit of the whole cargo, to secure a general advance, so as to bind his principals. It is his duty to keep the different interests separate

Where a general advance is made to a factor on a general deposit of goods owned by various persons, it must be borne rateably by all.

THIS was a writ of error to the District Court for the city and county of *Philadelphia*. It was an action of *assumpsit* brought by the plaintiff in error to recover the proceeds of his goods, sold by the defendants.

On the trial of the cause, the facts which appeared in evidence were substantially as follows:

In April, 1823, the plaintiff, by his agents Thomas & Martin, made a shipment of nine hundred and sixty pieces of blue Moreas, valued at two thousand seven hundred and nine dollars and twenty-four cents, to St. Jago de Cuba, by the schooner Sally and Polly, consigned to Clayton Hollinshead, supercargo on board, for sale and returns. In the letter of instructions,

* For the report of this case, the reporter is indebted to John L. Newbold, Esq., who was of counsel in the cause.

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the supercargo was directed to sell the goods, if he could, but if not, to obtain an advance of one-half or two-thirds of their value in coffee. Various other shipments were made in the same vessel, likewise consigned to Hollinshead, and part of the cargo belonged to himself. He arrived in St. Jago in May, 1823, sold two hundred pieces of the plaintiff's goods to pay duties and charges, and left the balance of the plaintiff's goods, also the goods of the other shippers, and his own, which were then unsold, with the defendants, who were commission merchants at St. Jago, for sale. He gave the defendants at the same time a list of the goods left with them, in which the names of the various owners were marked, under the description of their goods. During Hollinshead's stay at St. Jago, he made a shipment through the agency of the defendants, of sugar, coffee, and molasses, amounting to fourteen thousand eight hundred and eleven dollars and seventy-five cents, on board the brig *Union*, bound to Philadelphia. In account-current between the defendants and Hollinshead, dated July 3, 1823, he was charged with the amount of the shipment per the *Union*, and credited with seven thousand three hundred dollars, for bills drawn by him by virtue of a letter of credit, the extent of which did not appear, and [*196] *with the net sales of the Sally and Polly's cargo. The account showed a balance against him of six thousand and sixty-two dollars and seventy-three cents. On the 5th of July, Hollinshead left St. Jago, after requesting the defendants, by letter dated 4th July, to dispose of the goods left for his account; he hopes the flour will bring the limits; but says they must do the best they can with it; he directs the dry goods to be sold for the prices fixed,—and states that some satins and teas would soon arrive, which he wishes them to sell, and credit him with five per cent. commissions for sales, and two and a half for purchasing or remitting. On Hollinshead's return to Philadelphia, he settled with Thomas & Martin, on the 9th of August, 1823, for two hundred pieces of the plaintiff's goods, which were sold, and paid them thirty-seven dollars and sixteen cents, the balance of their proceeds after deducting charges, &c. A correspondence took place between Hollinshead and the defendants, and Thomas & Martin and the defendants, of which the following is the substance:

May 7, 1824, Hollinshead writes to the defendants, acknowledging the receipt of theirs of the 13th of April; was astonished the flour turned out so badly; wishes the defendants to write to Thomas & Martin, respecting the blue India goods; inquires whether they will sell, and requests them to be careful to deduct out his commissions on sales and reshipments. May 20, 1824, Thomas & Martin write to the defendants, stating,

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that if their goods could not be readily sold at two dollars per piece, they wish them returned by the first opportunity. In August the defendants reply, stating that they had sold part of the goods, and will endeavour to sell the balance. November 12, 1824, Thomas & Martin write to the defendants inclosing Hollinshead's order for their goods, requesting remittance for sales made, and the return of the goods unsold. January 18, 1825, the defendants reply, that the sales are closed; and that they had rendered an account-current to Hollinshead, the 28th of October, which shows a small balance (two hundred and twenty-three dollars and six cents) in his favour, which they will hold subject to his orders.

February 19th, 1825, Thomas & Martin acknowledge the receipt of the defendants' letter of the 18th of January, and state, that from it they infer that the defendants made Hollinshead an advance on their shipment by the Sally and Polly: That Hollinshead is dead, and they therefore expect the defendants to unravel the mysterious business, as he had informed them he could not obtain an advance on their goods, but was obliged to sell two hundred pieces to pay freight, duty, &c.: That they wish the defendants to forward copies of the account of sales, and any receipts of Hollinshead for moneys advanced on their goods: That they do not understand why Hollinshead's order, forwarded on the 11th of November, is not sufficient to justify payment of the balance, if not more than the proceeds of the six bales of goods; and that on receiving copies of the accounts, they hope C. Hollinshead's character, and that of their house, will stand unimpeached. They add in the postscript, that C. Hollinshead informed them, that he, by several *opportunities, had forwarded orders to the defendants, to ac- [*197] count to Thomas & Martin for the proceeds of the goods, soon after his arrival from St. Jago, which was the reason of their not obtaining an order from him sooner, which will more fully appear by reference to his letters to the defendants of the 7th of May and the 12th of November, 1824.

May 19th, 1825, the defendants reply, stating that the accounts had been forwarded to Hollinshead in duplicate: That they now send copies: That it is not their fault if Thomas & Martin's interests have suffered: That, as by their account-current they stand responsible to Hollinshead's estate for the balance it exhibits, they cannot transfer it to Thomas & Martin on the order sent, which did not reach them until after they had accounted to him, and that had it reached them sooner, they could only have accounted for the balance due after the liquidation of their advances.

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The account of sales is dated the 30th of September, 1824.
Sales of seven hundred and fifty-nine pieces Succatoons :

Gross sales,	\$1,518.00	
Matting,	12.00	
		<hr/>
	1,530.00	
Charges,	86.65	
		<hr/>
	\$1,443.35	due on the average.

November 1st, 1824.

The current-account dated the 1st of January, 1825, between C. Hollinshead and the defendant, showed a balance in his favour of two hundred and ninety-three dollars and six cents.

C. Hollinshead wrote to the defendants November the 12th, 1824, stating that he was pleased to hear they had sold all Thomas & Martin's goods, but had since learned they had sold but two hundred and fifty pieces : That he had given Thomas & Martin an order for the balance of their goods in the defendants' hands, and for the proceeds of those sold, and requests the defendants to deduct five per cent. commissions out of the sales, and two and a half per cent. if reshipped, and place them to his credit : That he was sorry Mr. Archer's goods would not sell : That he wishes them to make up his account and send it, as he wants to know the balance against him ; and wishes Mr. Shelton to send him the letter of credit he left with him when last in Cuba.

Jacob M. Thomas and James Martin, members of the firm of Thomas & Martin, commission merchants here, were examined on the part of the plaintiff, who proved that the goods in question belonged to the plaintiff at the time of the shipment : That a lot of goods, of which these were part, was placed in their hands by the plaintiff for sale : That they had made an advance on them to the plaintiff, but had sold enough to reimburse their advance : That Thomas & *Martin had no interest in [*198] the shipment, which was made under the direction of the plaintiff : That the defendants have never paid them the balance of two hundred and ninety-three dollars and six cents : That Hollinshead stated he could get no advance on the plaintiff's goods, which was the reason for making sales at such a sacrifice to pay the freight, duties, &c., on the outward shipment : That Hollinshead received his instructions from them, as agents of the plaintiff : That they never communicated to the defendants that the plaintiff had any interest in the goods : That their cor-

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respondence with the defendants was communicated to the plaintiff, and received his sanction and approbation: That Hollinshead was dead, considerably insolvent, and that they could never find among his papers the accounts which the defendants stated they had sent.

The plaintiff gave in evidence the outward manifest of the Sally and Polly's cargo, dated the 26th of April, 1823.

The defendants read in evidence the deposition of Thomas Brooks, a clerk in the employ of the defendants. He stated that Hollinshead arrived in St. Jago in May, 1823, in the Sally and Polly with a cargo of provisions and dry goods, consigned to the defendants: That from the list of the cargo, and from Hollinshead's not mentioning that any other persons were interested therein, he believed the cargo belonged to Hollinshead: That Hollinshead received the sum of six thousand and sixty-two dollars and seventy-three cents, an advance from the defendants, in cash and merchandise to himself, for repayment of which the goods were left in the defendants' hands, as per the list of goods and account-current: That Hollinshead, in his correspondence directed the defendants to sell the goods left: That in December, 1823, the defendants received an order from Hollinshead to deliver to C. Bispham's order part of the goods: That in the same month and year another order was received to account to M. Burrough for part: That in November, 1824, another order was received to account to S. Archer for part, which orders were accepted: That on the 27th of December, 1824, they received another order from Hollinshead, sent by Thomas & Martin, to account to them for the balance of six bales Moreas, left by him in the defendants' hands, which order could not be complied with, as the account of sales of these goods had been before rendered to Hollinshead: That the defendants owe Hollinshead or his representatives two hundred and ninety-three dollars and six cents, as per the account-current of January 1st, 1825: That the plaintiff never wrote to the defendants, nor the defendants to the plaintiff: That such copies of the defendants' letters to Hollinshead as the deponent could produce were annexed to the deposition: That the goods in question were always held and considered as the property of Hollinshead until the liquidation of all advances made, and they and their proceeds subject only to his order.

On his cross-examination he stated: That the defendants did not make the advance to Hollinshead on any one description of the merchandise remaining in their hands, separately and specifically, but, *made the said advance, receiving as [*199] security therefor the whole of the remaining goods, and the which, by his order, were to be sold for his account and the

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liquidation of the said advance : That on Hollinshead's arrival in 1823, the only unsettled account between him and the defendants was one in which there was a small balance in his favour of one dollar : That the defendants, as commission merchants, were agents in a sale of produce to Hollinshead in 1823, and shipped by them by his order on board the brig *Union*, bound to Philadelphia, in June, 1823 ; for whose account the deponent does not know ; the invoice was attached ; the amount of the shipment, fourteen thousand eight hundred and eleven dollars and seventy-five cents, was charged to Hollinshead in the account-current of the 4th of July, 1823, as due that day : That it was never known to the deponent, nor as he believes to the defendants, that the goods in question were shipped by any other person than Hollinshead, unless Hollinshead might have stated verbally that others were shippers, of which the deponent had no recollection ; nor was there any positive information given, as the deponent believes, to the defendants, to cause them to know that the said goods actually belonged to any other person, or to whom they belonged, until the receipt of Hollinshead's order of the 31st of October, 1824, received the 27th of December, which stated that the goods belonged to Thomas & Martin, and were consigned to Hollinshead by them, and then for the first time directing the defendants to follow Thomas & Martin's directions relative to the said goods ; although the defendants had before received a letter from Thomas & Martin on the subject of the said goods, dated 5th mo. 21, 1824, which stated that Hollinshead had ordered the proceeds of sales to be remitted to them, but said nothing of their or any other person's property in said goods ; nor was any order of Hollinshead's so to account to them for them, ever received by the defendants until the one before mentioned, on the 27th of December, 1824 : That in the list of goods left by Hollinshead at his departure from St. Jago, in 1823, is written the name of Thomas & Martin over the description of the goods in question, from which circumstance the deponent inferred, that the said goods were received from Thomas & Martin, either through purchase or otherwise, but their right in the property was never made known specifically to the defendants until the transfer ordered by Hollinshead : That Hollinshead made no consignment of goods to the defendants after he left Cuba in 1823, except a small bill of castings amounting to one hundred and thirty-two dollars and twenty-eight cents ; and that Hollinshead took from the defendants a receipt for the goods left, of which a copy was annexed. The correspondence between Hollinshead and the defendants, and Thomas & Martin and the defendants was annexed to the deposition.

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The accounts sales made by the defendants are headed, "Account sales by Wright & Shelton of sundries received per schooner Sally and Polly, by order of C. Hollinshead, for account of all concerned."

*In account-current No. 10, under date of March 4, 1824, is an entry of charges on Archer & Bispham's [*200] goods.

The defendants also read the deposition of two witnesses, commission merchants of St. Jago de Cuba, who stated that it was the usage of trade there, for the resident merchants to make advances on merchandise and cargoes deposited with them for sale, and to sell the same for account of the person to whom the advance was made, and put the proceeds to his credit in account: That they treat the supercargo as the owner, and will not account to the foreign shipper without an order from the supercargo, and then only for the balance beyond the advance: That it was not the practice to ask supercargoes for invoices or letters of instruction: and that there are about eight commission houses at St. Jago, all of whom conform to this usage.

Samuel Archer was examined for the plaintiff, and stated, that in 1823 he shipped goods by the Sally and Polly, by C. Hollinshead: That they were placed in the defendants' hands for sale: That they were sold for more than the limits, and the proceeds of the sale remitted, 3d of September, 1825, amounting to two thousand and eleven dollars and nineteen cents: That he thought he received no order from Hollinshead for his goods; no mention of any was made in the correspondence; it was probable Hollinshead wrote to the defendants to make sales: That he obtained no advances from the defendants; and did not think he authorized Hollinshead to take any advance.

The correspondence between S. Archer and Hollinshead, and between S. Archer and the defendants, was read, but is not material.

The judge (after stating the evidence) says:—What is the character of the balance of six thousand and sixty-two dollars and seventy-three cents, due on the 5th of July, when the supercargo left the island? Was it his own debt, or contracted on the credit of the cargo? He had a letter of credit to some extent, as appears by his letter of the 12th of November, 1824; what its extent precisely was, does not appear. On the 5th of July, the shippers had full confidence in him. There was no suspicion, that appears, of his infidelity, or prospect of his subsequent death and insolvency. Did the defendants act fairly and *bona fide* in the course of trade? Was this a pledge for his own debt, or like the case of *Laussatt v. Lippincott*, in the

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Supreme Court, cited by the counsel, a deposit in anticipation of a sale, out of which the advances were to be repaid? It would seem to me it was not a pledge, but a deposit of that kind. The defendants certainly never trusted him on his personal credit for so large a sum. Supercargoes are generally young men, known to be of little or no property. Independently of usage, therefore, the case in this respect is favourable to the defendants; but I wish you carefully to examine Backus and Chamberlain's evidence, as to the course and usage of [*201] trade. If such a usage is proved, is it a reasonable *one? Is it not like the usages of other places? You will judge for yourselves whether this usage is proved, and if it is, whether it be reasonable, and whether it be not conformable to the general mercantile usage and course of trade. Brooks' evidence perhaps goes too far; but supposing the defendants to have known the real character of Clayton Hollinshead, and the names of all the shippers, does it alter the case? He was in their full confidence, he was their authorized agent, with the large powers of a supercargo. Might not the defendants consider him the proper person to raise and settle accounts with, and leave him to apportion and distribute among his principals? Was there any privity independently of the specific orders between the shippers and the defendants? Are their accounts true extracts from their books, made up as they bear date; (for we must carry ourselves back to the 5th of July, 1823, and the other times mentioned on the face of the papers,) or were they made up from subsequent events? In the absence of proof, if the defendants' characters are fair, they are to be presumed to have been regular and correct.

But orders were given and accepted in favour of several of the shippers. But independently of this, consider, as I said before, if the defendants might not trust the supercargo to distribute the funds among the shippers, his employers. Consider the law. A factor cannot pledge, though his character is unknown to the pledgee. It is hard, but the law is so settled. Courts have struggled to get out of it, or distinguish cases from its principles. Examine the cases cited from *Patterson v. Tash*, down, and *Laussatt v. Lippincott*, and the usage of trade. This it appears to me was no pledge, but a deposit, with power to sell according to that usage, (if you find it to be one,) not for payment of his own debt, but to reimburse advances made to him as supercargo. On the whole, if you are satisfied that the defendants acted fairly and *bona fide*, according to the usage of trade, as it existed at St. Jago de Cuba, or according to general mercantile usage and course of trade, they are justified in retaining the proceeds of the plaintiff's goods, and he is not entitled to recover the one

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thousand four hundred and thirty-one dollars and thirty-five cents which he claims; unless you can discover something unmercantile in the defendant's conduct, something like fraud, something to deserve blame and censure.

He directed the jury, if they found for the plaintiff for the balance of two hundred and ninety-three dollars and six cents, to give a verdict for that sum, with or without interest, subject to the opinion of the court, whether, on the whole evidence the plaintiff was entitled to recover that amount. He charged on three points as requested by defendants' counsel:

1. That if the jury believe that the defendants acting *bona fide*, made advances at St. Jago de Cuba to C. Hollinshead, supercargo and consignee, on his depositing the goods in question with them for sale and payment of the advances, and that this was done in conformity with the usage of trade at that port, the defendants are entitled *to retain the goods and proceeds thereof for the payment of the advances so made. [*202]

2. That even if the defendants knew or suspected that there were several owners of the cargo, and made advances on the whole *bona fide*, in conformity with the usage of trade at St. Jago de Cuba, to C. Hollinshead, as supercargo and agent of all the owners, and on their account, which advances were distributed by C. Hollinshead, in proportions unknown to the defendants, the defendants properly accounted with C. Hollinshead.

3. That Thomas & Martin having acted throughout with the sanction and approbation of the plaintiff, he is bound by all their acts and omissions.

To this charge the plaintiff's counsel excepted and the judge sealed a bill of exceptions.

The jury found a verdict in accordance with the charge of the judge for the balance of two hundred and ninety-three dollars and six cents, with interest, and the plaintiff sued out a writ of error.

The points made by the plaintiff's counsel on the trial were

1. That in point of fact no advance was made by the defendants on the plaintiff's goods.

2. That Hollinshead, the consignee, had no authority to take such an advance on the goods as this was alleged to be.

3. That the defendants knew Hollinshead was the agent and not the owner.

4. That after they knew it, they delivered goods and made payments to the other shippers, when, if the advance was made as was alleged on the goods of all the shippers, it should have been borne rateably by all.

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5. That the usage of trade relied on by the defendants had none of the requisites to constitute a good usage.

J. L. Newbold for the plaintiff in error.

1. The most material questions of fact were withdrawn from the jury; these were: 1. Was there in fact any advance on the plaintiff's goods? 2. If so, what was its character? Was it a pledge by the supercargo for his own debt? The plaintiff was entitled to the opinion and judgment of the jury on these points, which were purely questions of fact. The judge decides them both. He says, "This was no pledge, but a deposit for sale, not for payment of his own debt, but to reimburse advances made to him as supercargo." He says it was like the case of *Laussatt v. Lippincott*, 6 Serg. & Rawle, 386, yet there it was expressly left to the jury to say whether the deposit was a pledge or sale. *Work v. Lessee of Maclay*, 2 Serg. & Rawle, 415; *Hershey v. Hershey*, 8 Serg. & Rawle, 333.

The charge of the judge was confused, so as to leave the jury at a loss, which is error. *Selin v. Snyder*, 11 Serg. & Rawle, 319; *Less. of Snyder v. Snyder*, 6 Binn. 498; *Work v. Lessee of Maclay*, 2 Serg. & Rawle, 417. Questions of fact [*203] and law are blended throughout the charge so as to render it difficult for the jury to distinguish between them. Both law and facts were decided by the judge against the plaintiff; nothing was left to the jury. "The court should sum up the facts and submit them with the inferences of law; but care should be taken to separate the law from the facts, and leave the latter in unequivocal terms to the jury, as their peculiar province," says Judge Story in *M'Lanaham v. U. In. Co.*, 1 Pet. Rep. 182. The evidence we thought was decisive that there was in fact no advance, and that if there was, the advance was a pledge for Hollinshead's own debt, in either of which cases the plaintiff was entitled to recover. The judge took these questions from the jury, and erred in doing so.

2. The judge erred in telling the jury, the plaintiff was bound by Hollinshead's act in obtaining an advance, and that the defendants were entitled to retain for payment of the advance. This brings up the question, can a factor pledge the goods of his principals? The judge admits in terms that the law is settled that he cannot, but denies the present case to be within the rule. It is not necessary to inquire into the policy of this rule; it is sufficient to show the law is, and has long been settled, and cannot now be altered, except by an act of the legislature. I shall cite the various cases, not to establish the rule, but to show the nature of the cases to which it has been applied. The present case cannot be distinguished from some of them.

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The first case was *Patterson v. Tash*, 2 Str. 1178. Then followed, *Daubigny v. Duval*, 5 T. Reps. 604; *Newsom v. Thornton*, 6 East, 17; *Martini v. Coles*, 1 Maule & Selw. 140. This case is very similar to the present. *Shipley v. Keyser*, 1 Mau. & Sel. 484, 493. In this case the question was made whether sale or pledge, and decided to be a pledge. *Soley v. Rathbone*, 2 Mau. & Sel. 301; *Cochran v. Campbell*, Ib. in note; *M'Combie v. Davies*, 6 East, 538; s. c. 7 East, 5; *Baring v. Correy*, 2 Barn. & Ald. 137, 143, 149; *Pickering v. Busk*, 15 East, 38. There are various cases in our own country. *Skinner v. Dodge*, 4 Hen. & Mun. 432; *Van Amringe v. Peabody*, 1 Mason, 440; *Urquhart v. M'Iver*, 4 Johns. Reps. 103; *Kinder v. Shaw*, 2 Mass. Reps. 398; *Evans v. Potter*, 2 Gall. 13; *Rodriguez v. Hefferman*, 5 Johns. Ch. Rep. 417; *Kennedy v. Strong*, 14 Johns. Rep. 128; *Buckley v. Packard*, 20 Johns. Rep. 421. This case is very much like the present. The plaintiff, a merchant in New York, consigned goods to the master of a vessel bound to Havana. The master at Havana delivered them to the defendants, commission merchants there, for sale. The defendants sold, and retained the proceeds to indemnify themselves for advances made to the master. The plaintiff recovered. There are some later cases in the English books, in all of which the doctrine is recognised, and continued to be until the act of parliament changing the law in 1825. *Peet v. Baxter*, 2 Eng. Cbm. L. R. 472; *Fielding v. Kymer*, 6 Ib. 295; *Kuckein v. Wilson*, 6 Ib. 408; *Barton v. Williams*, 7 Ib. 145; *Queiroz v. Trueman*, 10 Ib. 103; *Sterneld v. Holden*, 10 Ib. 260; s. c. [*204] *21 Ib. 422; *Greenway v. Fisher*, 11 Ib. 362; *Sellick v. Smith*, 13 Ib. 66; *Blanay v. Allen*, 14 Ib. 385. But it may be said in the case of *Laussatt v. Lippincott*, 6 Serg. & Rawle, 386, is an answer to all this array of authorities. There the doctrine that a factor cannot pledge was recognised. That case was very different from the present. That was a case of sale, so found by the jury. There is no analogy between the cases.

3. The usage of trade set up cannot help the defendants. It is contrary to a long established, well settled rule of law. That this cannot be, is settled by authority. *Frith v. Barker*, 2 Johns. Rep. 335. C. J. Kent says, "although usage is often resorted to for explanation of commercial instruments, it never is or ought to be received to contradict a settled rule of commercial law." *Collings v. Hope*, 3 Wash. C. C. Rep. 149; *Edie v. East In. Co.* 2 Burr. 1216. It cannot be supposed that the plaintiff knew of such a usage when he shipped his goods; if not known, there is no equity in his being bound by it.

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Meredith and *Dunlap*, for the defendants in error.—It is not error for the judge to give his opinion on matters of fact, provided he leaves them to the jury. He did in this case leave the facts to the jury. Was the cargo deposited with the defendants for sale? Was an advance made by them on the cargo? Was that advance made *bona fide*, and in the usual course of trade? These were questions of fact, and were left to the jury. Whether the transaction amounted to a pledge, or a sale, or *quasi* sale, was (the facts being found by the jury) a question of law; and the same question which was decided in *Laussatt v. Lippincott*. The judge followed that case strictly. There were, however, two circumstances in the present case, which rendered the question of pledge or sale immaterial, viz.: 1. That the plaintiff had instructed Hollinshead to pursue the very course which he did pursue; and 2. That he subsequently ratified his acts. *Robinson v. Justice*, 2 Penn. Rep. 23; *Graham v. Graham*, 1 Serg. & Rawle, 330; *Renn v. Penn. Hos.*, 2 Serg. & Rawle, 413; *Poorman v. Smith's exors.*, 2 Serg. & Rawle, 464; *Riddle v. Murphy*, 7 Serg. & Rawle, 237; *Johnston v. Gray*, 16 Serg. & Rawle, 361; *Roberts v. Ogilvie*, 9 Price, 269; *Doug.* 492; 1 *Mason*, 270; *Bredin v. Dubarry*, 14 Serg. & Rawle, 27. But if there had been no such instructions, and no ratification, still the plaintiff would not be entitled to recover in this action. He shipped goods (in common with several other shippers) as part of a general cargo, of which Hollinshead appeared to the world as the sole owner. The defendants had no notice that any other person was interested in them. The goods were really shipped for sales and returns. Hollinshead obtained an advance on the whole cargo, and with that advance shipped the return cargo. He distributed that return cargo among his principals, in what proportion the defendants did not, and could not know, even if they had known that Hollinshead [205] was merely an agent. Eighteen months *after leaving the island, Hollinshead gave orders to Bispham, Archer, &c., for goods left in the defendants' hands. Those orders were honoured. Thomas & Martin, whose acts are admitted to be the acts of the plaintiff, afterwards obtained an order on the defendants to account to them, when the goods should be sold and the accounts made up. Thomas & Martin had ratified the intermixture made by Hollinshead of the interests of all the shippers, by making the settlement with him for the two hundred pieces of Moreas which had been sold, and the circumstances under which that settlement was made. When advised by the defendants of the final sales, and of the state of Hollinshead's account, Thomas & Martin questioned the fact of his having obtained advances to so great an extent, but not his right to obtain them. Under the circumstances the defendants were in

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law bound to, and in fact could account to Hollinshead, and no other person. *Pinto v. Santos*, 5 Taunt. 447; 1 Eng. Com. Law Reps. 152.

Again, the course of the factor in this case was precisely similar to that which was held legal by this court in *Laussatt v. Lippincott*, 6 Serg. & Rawle, 386, being according to the course of trade. Here, the usage of trade in the island of Cuba was proved to be the same.

Again; the doctrine that a factor cannot pledge to a party who deals *bona fide* in the transaction, is not law in Pennsylvania. In *Laussatt v. Lippincott*, the principle laid down in the modern English cases, was indeed admitted by the court, but a nice distinction was taken, in order to relieve that case from the operation of the rule. The authority of the case is limited to the point decided, viz., that an agent may deposit his principal's goods for sale, and take an advance on them in the usual course of trade.

The general commercial law of Europe protects every man in dealing *bona fide*, by pledge or otherwise, with a factor. 2 Kent's Comm. 628. The principle of the common law is the same. In *Wright v. Campbell* (4 Burr. 2046; s. c. 1 Bl. Rep. 628), decided in 1767, the transaction was a pledge by the factor for his own debt, although in form a transfer of the property by indorsement of the bill of lading. Lord Mansfield and the whole court held, that the party taking the pledge was protected, provided he had acted *bona fide*, and a new trial was granted for the purpose of having that fact found. The loose note of *Patterson v. Tash* (Stra. 1178) was cited on the argument of *Wright v. Campbell*, and disregarded by the court. The law stood then, at the time of the decision of *Daubigny v. Duval* (5 T. R. 604) upon *Wright v. Campbell*, and in conformity with the commercial law all over the world. The unfortunate disposition to shake Lord Mansfield's reputation, which prevailed in the court of K. B. for some years after his death, is notorious. It was that disposition which induced the court to take the fatal step, in *Daubigny v. Duval*, of overruling *Wright v. Campbell*, and on the loose authority in *Strange*, laying down the rule that a factor cannot pledge. It has since been ascertained that Lord Chief Justice Lee's *decision in *Patterson v. Tash* [*206] in *Strange*, was by a mistake of the printer entirely mis-stated. The decision in that case was that a factor can pledge. The printer misprinted it "cannot." Lord Chief Justice Lee in fact had decided the question in conformity with common sense, and in the same manner that Lord Mansfield afterwards decided it. The same case of *Patterson v. Tash*, upon the same facts, had been heard in Chancery before Lord

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Hardwicke, (9 Mod. 397,) who refused to interfere, declaring that the course pursued by the factor in that case was legal, that the party so dealing with him was protected, and that it was the common practice and had been repeatedly so decided in Chancery. This decision of Lord Hardwicke, by a mistake of the Index maker, escaped the notice of court and counsel in all the subsequent English cases, and has never been cited until now.

Lord Mansfield, Lord Hardwicke, and Lord Chief Justice Lee, then, all agreed on this question, and *Daubigny v. Duval* was really decided in opposition to all of them, although the blunder of a printer had apparently thrown Lord Chief Justice Lee's authority into the opposite scale, and the blunder of an Index maker, had prevented Lord Hardwicke's opinion from coming to the notice of the court. *Daubigny v. Duval* was followed by many subsequent English cases, which threw the commercial community into such confusion that it became necessary to pass an act of parliament (2 Kent's Comm. 628, note) to restore the law to its former state. The late English cases were followed in New York, and a similar act of assembly was found necessary there. They have never been yet followed in Pennsylvania, and it is trusted, never will be, since the blunders in which they originated have been since exposed.

Again—there is a marked distinction to be traced between the powers of an ordinary factor, and those of a supercargo. Hollinshead was a supercargo, and of his power even to pledge, there can be no doubt. Thus a supercargo may change the destination of the goods in his charge, (4 Camp. 183; 2 Camp. 529.) An ordinary factor cannot, (12 East, 381.) A supercargo may substitute another factor, (2 Bos. & Pul. 438); a factor cannot (2 Mau. & Sel. 298). A supercargo may sell at less than the limited price (3 W. C. C. Rep. 151; 4 Binn. 362), which a factor is not justifiable in doing. A supercargo may exercise a general discretion, which a mere factor cannot do, where he has instructions (4 Binn. 362; 2 Mod. 100). A supercargo has the entire control of his principal's goods in his charge (12 East, 381), which a mere factor has not. Nothing but fraud will make a supercargo even liable to his principal (6 S. & R. 300), far less invalidate his contracts with third persons. Finally, a supercargo may pledge (*Evans v. Potter*, 2 Gall 13); "he may lawfully pledge," says Judge Story, "for anything in the ordinary course of trade." And the same principle is laid down in *Merrick v. Bernard*, 1 W. C. C. Rep. 479.

In most of the cases which appear against us, there was knowledge *or fraud in the party dealing with the

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4 Hen. & Munf. 432; 1 Mason, 440; 4 Johns. 103; 2 Mass. Rep. 398; 14 Johns. 128; 20 Johns. 421; 4 Camp. 60; 2 Esp. 557; 4 D. & N. 648; 1 Esp. 111; 15 East, 400; 1 Vez. & B. 202; 1 Wash. C. C. R. 174; 3 W. C. C. Rep. 151; 1 Wash. C. C. R. 479; B. N. P. 130; 18 Johns. 24; 2 Serg. & Rawle, 417; 8 Serg. & Rawle, 335; 11 Serg. & Rawle, 319; 6 Binn. 498, 491; 1 Peters, 182; 9 Serg. & Rawle, 202; 11 Serg. & Rawle, 134; 3 Binn. 80; 1 Serg. & Rawle, 72, 176, 330; 2 Serg. & Rawle, 70, 413, 464; 3 Serg. & Rawle, 500; 4 Serg. & Rawle, 442; 2 Str. 1178; 5 T. R. 604; 6 East, 17; 1 Mau. & Sel. 140, 484; 2 Mau. & Sel. 298; 7 East, 5; 2 Barn. & Ald. 137; 15 East, 38; 10 Com. Law. Rep. 260; 21 Com. Law Reps. 422; 1 Ry. & Moody, 219; 2 B. & B. 639; 2 Com. Law Rep. 472; 6 Com. Reps. 480; 7 Com. Law Reps. 145; 10 Com. Law Reps. 103; 11 Com. Law Reps. 262; 13 Com. Law Reps. 66; 14 Com. Law Reps. 385.

Chauncey in reply.—The questions presented in this cause are of great commercial interest. The plaintiff made a shipment of goods consigned to a supercargo with special instructions. The consignee in the foreign port was well known to be a supercargo, and as appears by the evidence, so known to the defendants by former transactions. He presented himself to the defendants with a cargo belonging to different shippers, as must have been known to the defendants, and to defray incidental expenses, he sells part of the cargo at a sacrifice. He was owner of part of the cargo himself. He placed that with the goods of several of the shippers in the hands of the defendants for sale. He received an invoice of sugar, coffee, &c., from the defendants and came with it to the United States. The allegation of the defendants was that he received this as an advance on the goods placed in their hands, and that they were entitled to reimbursement from the sales of the goods.

The judge charged that this was a deposit in anticipation of a sale, and not a pledge for his own debt: That independently of usage this made the case favourable to the defendants: That if the defendants acted *bona fide*, and according to the usage of trade at St. Jago, or general usage, they were entitled to retain. We contend, that the fact of the advance and the character of it, were for the jury and should have been so put to them: That usage was a mixed question; whether there was usage, and what it was, for the jury—what its effect, for the court: That no usage, to be regarded in point of law, was proved at all; and that the charge as to good faith and usage is not sustainable in law.

1. If the judge's meaning is apprehended it is, that this was

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a deposit and not a pledge, and assuming this, that if they believed the defendants acted fairly and *bona fide* in the course of [*208] trade, they were entitled *to retain. If he did thus assume, he invaded the province of the jury in a very nice and difficult question.

As to the fact of the advance and nature of it, the whole rested on the testimony of Brooks, the defendant's clerk, who does not venture to assert it, but in the faintest manner. The evidence was powerfully strong against it. Two hundred pieces of the plaintiff's goods were sold at a loss to pay duty, freight, &c.

The accounts show the advance was on the supercargo's own property, the sales he had made and the letter of credit he left behind him.

Was not this a pure question of fact which the judge ought to have left to the jury? He did not leave it to them because he makes an assumption on which he founds a direct charge.

2. If the judge did not assume this fact, he so presented it to the jury as to give it the aspect of a question of law. "Was this a pledge for his own debt, or like *Laussatt v. Lippincott*, a deposit for sale? It would seem to me it was not a pledge." The conclusion he arrives at is a legal conclusion. It is said the jury have found on this question. It is in the power of no man on this charge to say what the jury have found. They had no distinct question presented to them. They had no precise direction or instruction in point of law, and they were left really without a guide, but with the opinion of the judge on both law and fact against the plaintiff.

3. The charge of the judge is to be gathered from the answers to the questions proposed. The case he puts is, knowledge by the defendants that *Hollinshead* was an agent; good faith on the part of the defendants; and an advance according to the usage of trade. This being supposed, he says the defendants were entitled to retain. We contend he erred in point of law. The general rule of law that a factor cannot pledge the goods of his principal, cannot be questioned. If the defendants knew the agency and the instructions, they were bound by them. If they knew the agency, but not the particular instructions, they had no right to treat him as the principal in the disposition of the property. The supercargo is a factor, with no greater powers than a resident factor. There is one rule for both. Necessity may produce a new rule, and is more likely to arise in the case of a supercargo than in that of a resident factor. The cases cited do not bear out the distinction attempted to be shown between supercargoes and factors.

But it is supposed the judge derives aid from usage. This is

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not a subject of usage but of law. The attempt is to establish a usage which mocks all law. This usage is made by eight men, who make it to suit exactly their own interest; and two of them testify to it. I understand that usage of trade, a course of dealing, may be resorted to to explain a commercial instrument; but not to set aside a rule of law. It may be resorted to to show an agent has conducted himself according to it, never to vindicate a breach of his instructions. *Frith v. Baker*, 2 John. Reps. 335.

*As to general mercantile usage to which the judge refers, there was not a particle of evidence. It was not [*209] even asserted that any existed. What is there to justify the charge "that if the defendants acted *bona fide* and according to usage, they are entitled to retain?"

The law being that a factor cannot pledge, the plaintiff was clearly entitled to the benefit of it in this case. It was a pledge for the factor's own debt. The cargo was not looked to for security. The accounts speak a language irreconcilable with the defendants' allegation. They are headed "for account of all concerned." Half commissions are credited to Hollinshead.

The judge says the case comes within *Laussatt v. Lippincott*. Can two cases be more unlike? There the broker took the goods to an auctioneer, committed them to him for sale, and received a note in anticipation of the sale, and this according to the course of trade. Here, the supercargo left the plaintiff's goods for sale, but never received a dollar of advance on them. It was essential to the defendants' case to show that he did receive an advance. If Hollinshead had received an advance in coffee, it was within his instructions. It has been argued that he did, as the invoice of the return cargo consisted partly of coffee; but the evidence wholly negatives that it was for the plaintiff. The ground taken by the defendants here is inconsistent. They say the supercargo had express authority to take an advance; yet they prove they never saw or heard of the instructions; that they only knew Hollinshead.

If the defendants had shown the advance on the plaintiff's goods agreeably to the authority given, the case would have been with them.

The defendants were accountable, after they received notice of the different interests, for a fair distribution. They certainly knew in June, 1824, of Thomas & Martin's interest, yet long after they pay Mr. Archer for his goods, and retain the plaintiff's only. *Pinto v. Santos*, 5 Taunton, 447, (1 Eng. Com. Law Reps. 152.)

But it has been said, that the plaintiff affirmed the transac-

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tion. There is nothing like this in the correspondence, or in the evidence given.

ROGERS, J.—This was an action of *assumpsit* to recover the proceeds of certain goods, which were sold by the defendants, who were commission merchants in St. Jago de Cuba, on account of the plaintiff.

The plaintiff, through Thomas & Martin, commission merchants, made a shipment with others, in the schooner Sally and Polly, which they consigned to C. Hollinshead, the supercargo, with a letter of instructions to sell the goods to the best advantage, as soon as the market would admit, and remit the proceeds in good bills, specie, or coffee; to sell for cash or a short credit. He then adds, that if the goods could not be sold during his [*210] stay, he should put them in the *hands of a house of respectability, and obtain an advance of one-half, or two-thirds of the value in coffee.

C. Hollinshead arrived in St. Jago de Cuba, the port of destination, in May, 1823, and left there, for the United States, about the 5th of July, 1823; and being unable to sell the goods, according to his instructions, he left them, as he was directed, in the hands of the defendants.

Wright and Shelton, the defendants, by order of C. Hollinshead, on the 19th of June, 1823, shipped on board the brig Union, on account of whom it might concern, property, consisting of sugar, coffee, and molasses, amounting to fourteen thousand eight hundred and eleven dollars and seventy-three cents.

A copy of an account-current, was also exhibited in evidence, dated the 4th of July, 1823, showing a balance against C. Hollinshead, of six thousand and sixty-two dollars and seventy-three cents.

The defendants allege, that the shipment on board the brig Union, was received as an advance on the goods placed in their hands for sale, and that they are entitled to be reimbursed the balance above stated, from the sale of the goods.

The plaintiff denied the fact, that the advance was taken on the goods belonging to the plaintiff, and the other shippers.

He also contended, that if the supercargo did take such an advance, he had no authority to do so: That the defendants knew the goods were his, and that after they knew this, they delivered goods and made payments to other shippers, when if the advance was made on the goods, it should have been borne rateably by all.

The first, it will be perceived, was a material point in the cause. It is obvious that if the money was not advanced on the credit of the goods, the defendants have not a pretence for say-

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ing, that they are entitled to reimbursement from that fund, for a debt due from the supercargo himself. In order to show that this was a transaction between C. Hollinshead and the defendants, without any relation to the goods placed in deposit, various documents were given in evidence, which have been fully examined by the counsel, in the course of the argument. They have also contended, that if there was any agreement, about an advance, which they denied, it was in reference to the shipment made and owned by Hollinshead himself. As the court thinks this cause requires a rehearing, it is not my intention to express any opinion on the weight of the evidence. I will barely observe, that it is by no means clear, that any advance was ever made on the credit of the goods owned by the shippers, other than those of C. Hollinshead himself, and for the repayment of which, the goods were deposited for sale in the hands of the defendants. Although this fact is proved by one witness, the documents would seem to speak a different language. This material fact, the plaintiff complains, was withdrawn from the jury. I have examined the charge with great care, and I cannot consider it otherwise than as a binding direction *in law and [*211] in fact, favourable to the defendants. The jury could not have found otherwise, than for the defendants, with such a direction, without disrespect to the plain intimations of the court. The judge instead of leaving the fact of the advance to the proper tribunal, charges the jury, that if they are satisfied the defendants acted fairly and *bona fide*, according to the usage of trade, at St. Jago de Cuba, or according to general mercantile usage and course of trade, they are justified in retaining the proceeds of the plaintiff's goods; and that he is not entitled to recover, &c., unless the jury can discover something unmercantile in the defendants' conduct, something like fraud, something to deserve blame or censure.

As to a general mercantile usage and course of trade, no evidence whatever was given; it is not pretended that there was; the court refer in the charge to the usage peculiar to St. Jago de Cuba, which was proved by two of the witnesses. If we are to credit them, it is the usage at that place, to make an advance on merchandise, deposited by supercargoes with commission merchants for sale; and to treat the supercargo as the owner of the goods. If so, according to the usage there, a factor, contrary to the general mercantile usage and course of trade, has a right to pledge the goods of his principal for his own debt, and in short, to do any other act which a principal might lawfully do, in the disposition of his own goods. It is perfectly immaterial whether the fiduciary character of the supercargo be known to the commission merchants or not, or what

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may be the nature and extent of his instructions, or whether those instructions be known to them or not. They treat him in all respects as the owner of the goods. This, then, is the usage which the court has thought proper to leave to the jury, with directions that if the jury believed such usage did exist, they should find for the defendants. This usage (although very convenient doubtless to the commission merchants of St. Jago de Cuba) in its utmost latitude, is not only contrary to the law of this state, but, it is admitted, that it is in opposition to the law of every mercantile country; for notwithstanding the elaborate arguments of the defendants' counsel, I am not permitted to doubt, that it is the well established law of this state, of our sister states, and of England, that though a factor may sell and bind his principal, he cannot pledge the goods, as a security for his own debt. The principal may recover the goods of the pawnee; and his ignorance that the factor held the goods in the character of a factor is no excuse. The principal is not even obliged to tender to the pawnee the balance due from the principal to the factor, for the lien which the factor might have had for such a balance is personal, and cannot be transferred by his tortious act, in pledging the goods for his own debt. The rights of principal and factor depend on the law merchant, which has been adopted by the common law. A factor is but the attorney of his principal, and he is bound to pursue the powers delegated to him. If the pawnee will call for the letter of advice, or make due inquiry, as to the source from whence the goods came, [*212] he can discover that the possessor held the goods as factor, and not as vendor, and he is bound to know at his peril, the extent of the factor's power. It may sometimes be a doubtful question, whether the transaction amounts to a sale, or a mere deposit, or pledge, as collateral security for a debt. But when it appears that the goods were really pledged, it is settled that it is an act beyond the authority of the factor, and the principal may look to the pawnee. There may, and have been, different opinions expressed in the books, as regards the policy of this rule, but however that may be, I agree with the Chief Justice in *Laussatt v. Lippincott*, that the principle, that a factor cannot pledge the goods of his principal, is too well settled to admit of dispute. On the European continent it would seem a different rule in some respects prevails. There, possession constitutes title to movable property, so far as to secure *bona fide* purchasers, and persons making advances of money, or credits on the pledge of property by the lawful possessor. I understand the rule on the continent to be, that a purchaser or pawnee, without notice, will hold the property against the principal, and in that, it differs from the rule of

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common law, where want of actual notice is immaterial. The usage at St. Jago de Cuba goes to a greater extent than on the continent of Europe, for the witnesses state their custom to be, for the commission merchants to treat the supercargo as owner, without any regard to the extent or nature of his instructions, and whether they have notice of them or not. Such usage should have every requisite to give it validity. A custom or usage, to make it obligatory must be ancient (sufficiently so at least to be generally known), certain, uniform, and reasonable. A usage of so doubtful an authority, as to be known to but few, cannot be regarded. *Collins & Co. v. Hope*, 3 Wash. C. C. Rep. 149.

When this usage commenced we have not been informed. It is not proved to have been ancient, or sufficiently so to be generally known. It was made by eight men to suit their own convenience, and has been proved by two of them. That it is unknown to the mercantile community in this state is very uncertain. That it was known to the shippers is not pretended. It does not possess a single requisite to constitute a custom. The shippers relied on the law merchant, in which it is clear that a supercargo is bound by his instructions. They authorized him in a certain event, to employ a commission merchant, whom they must also have supposed would be bound by their instructions. A factor may lawfully do whatever the usages and course of trade requires; and indeed, unless his orders restrict him, he is bound to conform to the course of trade. *Evans v. Potter*, 2 Gall. 13. But this is not a usage and course of trade. It is a local custom, peculiar to that place, made for the convenience of eight persons, in opposition to the laws, as it is known, in all commercial countries. It is not for them to prescribe rules to regulate commerce, except as among themselves. They must conform to the general commercial code. So far from this case turning on the usage of St. Jago de Cuba, we are of the opinion it should be thrown entirely *out of the [*213] question. It would be of pernicious consequence to the commercial world, to recognise such a custom, so proved, made for the benefit of a few, opposed as it is to the general mercantile law. It is an attempt to set up a custom in opposition to a general principle of law, which cannot be permitted.

It has been further contended, that this case is similar in principle to *Laussatt v. Lippincott*, 6 Serg. & Rawle, 386, and the learned judge seems to have been of this opinion. I am so unfortunate as not to be able to discover the resemblance. In *Laussatt v. Lippincott* it was decided, that if a merchandise broker to whom goods are delivered by his principal, with power to sell, deliver, and receive payment, deposit them in the usual

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course of business, with a commission merchant, connected in business with a licensed auctioneer, who advances his notes thereon, the deposit binds the principal, who cannot recover the value of the goods in an action of trover. The court considered this as an advance in anticipation of a sale, and justified by the uniform course of trade. Business to an immense amount, say the court, has been transacted in this manner, and the usage being established, it follows that when the plaintiff authorized his broker to sell, he authorized him to sell according to the usage, and when the defendants dealt with the broker, if they had known the coffee was not his own, they had a right to consider him as invested with power to deal according to the usage. In *Laussatt v. Lippincott*, both parties were acquainted with the usage, or were presumed to be so. But supposing the usage to exist, it is not pretended that Mr. Newbold knew of it; he cannot, therefore, with any propriety be said to have authorized the supercargo to deal according to the usage. In this the analogy fails. It is acknowledged to be of the first impression, for there is no case, as the Chief Justice says, exactly like it in the books. Without intending to cast the least doubt on the case, I do not feel disposed to extend the principle much further. If this had been clearly shown to be an advance in anticipation of a sale, on the plaintiff's goods alone, and the interest of the different shippers had been kept entirely distinct, there would have been some show of reason in likening it to *Laussatt v. Lippincott*. I am prepared to say, which is in analogy to the case, I would not protect a foreign broker or commission merchant in an advance so made. But what authority had the supercargo or sub-agent (for *Wright & Shelton*, can be regarded in no other light), what authority had they to intermix the interests of the shippers, by a general deposit of their goods in the hands of the defendants, to secure a general advance, even if it were made in anticipation of a sale. The case of *Laussatt v. Lippincott* does not sanction this, nor has any case been produced which does. It is in fact, making one man's goods liable for another man's debts, the justice and policy of which I have yet to perceive. This is beyond the power of a supercargo, or any other factor or agent. In *Shipley et al. v. Thymer et al.*, 1 Maul. & Selwyn, 484, it is said to be contrary to the duty of a factor to complicate the property [*214] of one with that of *other proprietors, in one general advance taken on the whole cargo. If we look to the letter of instructions by which the defendants are bound as well as the supercargo, we cannot perceive any such authority, and I am confident no prudent merchant, except under very special circumstances, would give such authority. The shipments in a general ship, are entirely distinct, although consigned to the

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same person. It is the duty of the consignee to keep them distinct; to open accounts against each owner. If we should yield to a different practice it would lead to great complexity in business, and as I verily believe, to innumerable frauds.

This case presents a singular feature. The defendants say, that they made a general advance, on a general deposit of goods owned by different shippers, and yet after they were aware of the fact of the ownership (as the plaintiff says), they paid the full amount of the proceeds of sale to several shippers, and now wish to be reimbursed for their general balance from the goods of the plaintiff alone. This would mete out a hard measure of justice to the plaintiff. If his goods are liable, they can only be ratably so. The goods of the other shippers were also liable, and it was the duty of the defendants to retain their proportion out of the proceeds of sale. It will be perceived, that I have considered the supercargo as a factor, and so far as regards this case, I cannot understand how he can be viewed in any other light. He is as much bound by his instructions as any other factor. He can justify himself in deviating from them, only in cases of necessity, some of which have been cited by the defendants' counsel. The defendants also, it must be observed, are sub-agents, and not purchasers.

It has been also urged, that the plaintiff cannot sustain this suit. As he was the undoubted owner of the goods, and the money has not been paid over, I can perceive no difficulty in the way.

HUSTON, J.—After the fullest consideration, I have not been able to concur in the opinion of the majority of the court, either in the view taken of the facts, or the law of this case; and after repeatedly reading every word of the testimony in this voluminous record, I have concluded that the one-half of the facts must be lost sight of, before the questions argued before us can arise. I am aware that each party selects and argues on what he supposes are in his favour. I have endeavoured to make up my mind on the whole of the case.

In April, 1823, Thomas & Martin, commission merchants in this city, having goods of the plaintiff's, put them on board of the schooner Sally consigned to C. Hollinshead, supercargo, viz., six bales of blue Moreas, containing nine hundred and sixty pieces, the value including the charges, two thousand seven hundred and nine dollars and twenty-four cents. Their letter of instructions directed Hollinshead to sell to the best advantage, as soon as the market would permit, and to remit in good bills, specie, or coffee; to sell for cash, or on short credit, and adds, if the goods could not be sold during his stay, to put them

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[*215] *in the hands of a house of responsibility, and obtain an advance of one-half or two-thirds in coffee. Six or seven other merchants shipped goods in the same vessel consigned to the same supercargo. What their instructions were does not appear, except S. Archer's, which is similar to the above; to get an advance on the goods in sugar or coffee. Hollinshead was obliged to sell part of the cargo to pay freight and duties, which it seems amounted to four thousand three hundred and thirty-six dollars. He sold part of the plaintiff's goods; two hundred pieces to pay part of the freight and duty on the whole cargo, as he informed Thomas & Martin on his return. (See their last letter to the defendants.) During his stay the defendants sold part of the cargo. He had letters of credit on which he drew bills for about seven thousand dollars, and got an advance on the unsold goods from the defendants for above six thousand dollars, and sent the goods thus purchased to this city. They left St. Jago in June, 1823. Of this there was one thousand three hundred and sixty-seven dollars and fifty-six cents in coffee; the rest in sugar, and some molasses; in all fourteen thousand eight hundred and eleven dollars. On the 23d of June the invoice is made out of those goods shipped by order of C. Hollinshead on account of whom it may concern. There is nothing to show whose goods had been sold to pay the freight and duties, of four thousand three hundred and thirty-six dollars; and up to this time I have not been able to ascertain that Wright & Shelton had any knowledge of who was the owner of a single article of the outward cargo; and Brooks, the clerk of Wright & Shelton, swears he did not know, and he believes his employers did not. After this return cargo had sailed, on the 4th of July, Hollinshead receives the account-current, showing a balance against him of above six thousand dollars; and on the same day makes and leaves with them a list of the merchandise left with them to be sold by them and make returns, and I suppose kept a copy. At the same time he writes a letter in which he refers to the list of goods to be sold on my account. Taking the list and letter as one and connected, it was a matter to be transacted on his account, and the returns to be made to him. In the list however there was a matter relied on by the plaintiff: it stood thus:

300 barrels of flour at	\$17	\$5,100
3 bales Madrass hkfs., 100 pieces each bale,	} 2,700	
300 pieces, at 9,		
1 bale Ventepolam hkfs. 100 at	4 50	450
17 rolls floor matting, at	12	204
<i>S. Archer.</i>		<hr/> 3,354

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2 trunks Madrass hkfs. 50 pieces each	100 at 9	900	
1 bale do.	100	900	
		<hr/>	1,800

Charles Bispham.

*1 trunk Madrass hkfs. 61 pieces at	9	549	[*216]
1 bale Meesulapotam 100 pieces at	4	400	
		<hr/>	949

Marmaduke Burrough.

760 pieces Succatoons at	2½	1,900
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Thomas & Martin.\$13,103

From the names written under certain parcels it was inferred that notice was given to Wright & Shelton, who were the owners of the several parcels of merchandise; and from the direction to them to retain for him two and a half per cent. commission, there was also notice that C. Hollinshead was supercargo and not owner. The first conclusion is denied, and Brooks swears it was not so considered or understood, and might be a mark of whom he got the goods from; but as he sent home a cargo sufficient to pay them all, they could not know to whom he would or would not deliver the return cargo, and were not bound to know. The defendants admit they knew he was a supercargo, but say, as the owners had trusted him to bring and to make returns, they were not bound to make any inquiries, or to know how the matter was settled on Hollinshead's return. The oath of Brooks is positive, that the advance was on the whole goods left, and not so much on each parcel. Hollinshead returned immediately after the 4th of July, and was here early in August. How the return cargo was disposed of does not appear. The defendants sold the flour as appears by their accounts for less than seventeen dollars; some for sixteen per barrel, it produced about

	\$4,786 50
deduct charges	259 26
	<hr/>
	\$4,527 24

They also sold part of the other goods (not Thomas & Martin's) as appears by the several accounts among the evidence; and by comparing the articles sold with the above list of articles, it will appear they sold part of those above the name S.

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Archer, part of those above C. Bispham, and part of those above the name M. Burrough, none of whom, so far as we know, ever objected, and all of whom got the proceeds of the remainder on the order of Hollinshead, and none of whom asked for anything from the defendants until they severally had Hollinshead's order.

Several exceptions are taken to the charge, but which in fact amount to only two. In the first place, it is apparent the charge has not been treated fairly. What is sent here is the abstract or notes from which to charge the jury, containing to be sure the points of law stated to the jury, but not all the evidence nor [*217] the half of the words *uttered, *e. g.*, we find this: "Examine the cases from *Patterson v. Tash*, down to *Laussatt v. Lippincott*, and the usage of trade." Now this was not said to the jury; but a memorandum to himself of the course he was to pursue in his address to the jury; and after being assigned as error, and much insisted on, was admitted to be what I have stated. Something similar occurs repeatedly in what is here called the charge. In a long and complicated cause, where much testimony is given, and many cases are cited, the judge in delivering his charge to the jury reads much, or perhaps all the testimony, and refers to many of the cases, perhaps reads some of them, and when requested to reduce his charge to writing, he never inserts in it the testimony read by him, never copies the cases commented on. The meaning of the law in its phrase, and in the uniform construction of it only requires his opinion on the matters of law applicable to the case.

The legal position, and in truth the only matter in contest here, was, that under the circumstances of this case Hollinshead had a right to deliver these goods to the defendants, commission merchants, to be sold, and account for the price, and had a right to receive a cargo from them on the credit of the outward cargo so left with them; and on the fullest consideration I think this opinion right on authority and on principle.

Before I come to that matter I shall consider a previous point or two. The law as to the power of a factor to pledge, arose on a question whether he could pledge the goods of his principal for his own previous debt, or for money then advanced for his own use. That was the case of *Patterson v. Tash*, and that was the matter decided in most of the cases, perhaps in all, before 1776; and it is not contested here. The fact whether this return cargo was for the use of the owners of the outward cargo, or of Hollinshead, is a fact for the jury, and was so left by the court; but he intimated an opinion on the facts. It has often been decided that he may do so. I am not sure he might not

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have gone further, and told them it was a conclusion of law from the facts proved, which might be rebutted by proof of collusion and fraud between the defendants and the supercargo. Let us look at the matter. Several men send goods in a vessel and appoint a supercargo; and we have evidence that the plaintiff and one other, directed him if he could not sell, to give the goods to a commission house and procure in advance a return cargo in coffee and sugar. We have no evidence of what the other shippers directed; but there is no dispute except with the plaintiff. The plaintiff and the other shippers had confidence in the supercargo, which continued for more than a year. He sold above six thousand dollars worth of their goods through the defendants; he paid freight and duties, &c., to above four thousand dollars through the defendants; during all this time the defendants do not know who was the shippers of the goods sold, or of those unsold. It is avowed, and was to the plaintiff expressly told by Hollinshead (see their last letter) that he had sold *part of their goods to pay freight and duty on the whole cargo; in other words he mingles all the goods [*218] as long as he stays, and as he, or the defendants for him are selling; he puts all unsold into the defendants' store, and directs sale, and receives a return cargo the defendants shipped; not so much sugar to one, and so much to another; not so many bags of coffee to one, and so many to another; but generally by order of C. Hollinshead for whom it may concern. Were the defendants bound to know to whom this return cargo was allotted when it came to Philadelphia? Could they tell Hollinshead your principals have trusted you, but we will not? Were they bound to send a supercargo and to settle with all the shippers here? This is not pretended. How then could they know who was to receive the proceeds of what should be left after payment of their own advances? Were they not justified in leaving it to Hollinshead to settle here, and to write to them to whom the overplus in their hands was to go? This was what was meant by the sales being made on his account, and their conduct as to the residue being subject to his order; and is it not clear that every shipper knew this, and agreed to it? Bisp-ham, and Burrough, and Archer, got each the order of Hollins-head, and on that each received portions of the goods. Thomas & Martin, who I have considered as the plaintiff, got his order; they were told it must be got. They assert no right without it; they get it, and send it, but after all the others, and only two hundred and ninety-three dollars left. I have seen no case, and do not believe it ever was, or will be decided, that a commission house abroad was bound to do more than ship the return cargo according to the orders of the supercargo. They are not,

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and cannot be bound to come here and see that it is divided ratably among those concerned; and without knowing that, it is impossible to know who will get any surplus which may be abroad. I think then the judge might have told the jury, that the return cargo must be taken to have been for the owners here: That unless the defendants colluded with Hollinshead to defraud the owners, all was right: That as all the persons here procured Hollinshead's orders for their respective goods, they all knew the whole goods were left subject to his order, and the plaintiff among the rest, and that it was too late to allege that the goods were left otherwise, at the end of eighteen months, so as to throw on the defendants a responsibility or loss, to which no contract, no understanding of the parties, and no usage of merchants would subject them.

It has not yet been said, that a factor cannot pledge his principal's goods to raise money for his principal, where he has the express direction of the principal to do so; and I shall assume it that it cannot be so said. Here, then, we have the express direction of Thomas & Martin, if their goods cannot be immediately sold, "to put them into the hands of a house of respectability, and obtain an advance of one-half or two-thirds in coffee." Hollinshead sold two hundred pieces to pay freight and duties on the whole cargo, and told them so. The defendants are not answerable for this; in fact no objection is [*219] made to it; the rest are put into the hands of the defendants, who do advance coffee. Now, were the defendants bound to see that the plaintiffs get the coffee, or a share of it? They were not, and they were never told that the plaintiff did not for one year, and not then. In May, 1824, they were asked for an account; that account would be necessary for a settlement here. Soon after they are requested to procure Hollinshead's order. They delay this till late in the fall, and do not send it for two weeks after they have it. They had before stated that they wrote because Hollinshead was sick and requested the remittance to themselves, but they never said Hollinshead's letter was not necessary, or that the defendants were not bound by his instructions. The question then, must be left to a jury, if there can be any doubt about it, whether the defendants were not justified if they had seen the plaintiff's letter of instructions, and whether they did not comply with it; for, I repeat, the defendants were not bound to come here and see that the plaintiff's own agent delivered them their share of the goods, and that not hearing from the plaintiff until next year, they had a right to presume all was right.

The course of business is constantly changing, and the names change. What were once called factors are now commission

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merchants. This alone would not change the rights of parties, but the duties have changed, and the powers have changed. A great part of the commerce of the world goes through their hands. It will not be attempted to define all their duties or authority, but whatever power they constantly exercise, and everybody knows they exercise, is part of their contract with those who employ them, and may be lawfully confided in by those who deal with them. A custom of old, affected real property as often or more so than personal property, and could not exist without certain requisites. It is an entirely different matter from what is called the usage of trade, or usage of a particular trade, which may be good though the trade itself is not thirty years old. The usage of a trade is spoken of in every law book, and recognised as binding on those engaged in it, in every country, and where not contrary to some positive law, or to the general law and policy of a nation, and not *malum in se*, forms a part of and is considered in deciding on all cases in that trade. In short, it is equal to an express authority to do what all others in that trade do, and legalizes all acts done according to it. Whether such a usage exists, is to be decided by a jury; if found that it exists, the court are to say whether it is within any of the reasons which make it bad. *Laussatt v. Lippincott*.

If it is the usage that a commission house shall take goods in advance on an outward cargo, and pay itself out of the amount of sales, this must be presumed to be known to all who engage in the trade; and particularly is this the case, if, when informed of it, the principal does not object. The authorities on this subject go farther; a principal knows that his factor is and has been in the habit of buying *and selling for the principal in the factor's own name, and writes to him advising of [*220] the price at which he may sell the goods on hand; the factor sells for less and fails; the principal detains the goods from the purchaser; the latter shall recover them, because the owners who have suffered the factor to continue dealing for them in the factor's name, shall not set up a latent special restriction to injure a fair purchaser. *Pickering v. Ass. of Hayward* and another, 15 East, 38.

This case has been put by the plaintiff on the authority of English decisions; and I admit the authority of *Patterson v. Tash*; but it, and all the cases which say a broker cannot pawn goods, express or imply that they are pawned for the broker's debt. To pledge for a debt of the principal is another matter. The factor himself may advance money to his principal on the goods, and has a lien on them for his own repayment; he may then pledge them to himself. A factor may employ a sub-factor, may not he also advance to the principal and retain till paid? I

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have found no case where the factor took up money for his principal on a deposit of the principal's goods, except to pay duties, and that is binding, not I apprehend because it was to pay duties, but because it went to the principal's use. But the goods here were not pawned; a pawn cannot be sold by the pawnee, unless by modern decisions, after great delay. Now the defendants had authority to sell these goods the minute they received them; they were put into their hands to be sold; or, to speak more properly, were sold to the defendants, but the price to depend on what could be got for them by the defendants; at least it partook more of a sale to the defendants than a pawn. The course of the business here was unknown when *Patterson v. Tash* was decided; and the case is to be decided on the principles applicable to the course of trade, that is to the intention and understanding of the parties. Let us now look to the authorities. 1 Maule & Selwyn, 140, has been cited to prove a broker cannot pawn, and it proves he cannot pawn the goods of his principal for his own debt. Lord Ellenborough, however, says, "the defendants having authority to sell the goods, if they advanced money for any purposes connected with the sale, and, for which, brokers, in the ordinary course of disposing of goods, are accustomed to advance it, would have had a lien in respect of such advance." This case then recognises the effect of usage, and that under it goods may be left for sale by a broker, and an advance made, and a lien for such advances, or, in other words, the defendants could retain for their advances out of the proceeds of their sales. Le Blanc, Justice, says, if advances were made to take up the bill of the consignor, and were appropriated to that purpose, there would be no mischief, and that might be considered in furtherance of the authority given by the principal; and Bailey, J., says, cases may, perhaps, exist where a principal would be bound by a pledge by his factor. I apprehend, however, if money was advanced to a supercargo to take up a bill of [*221] his principal, it would not be necessary that *he should go along and see it paid to the holder of the bill; he might confide in the person in whom the principal had confided.

The case of *Laussatt v. Lippincott*, 6 Serg. & Rawle, 386, however decides every point in this case; it admits *Patterson v. Tash*, to be law; it decides that an usage of trade may be proved; that the very usage proved in this case is not in violation of any principle of law; that a man may authorize another to pledge his goods; that this authority may be expressed or implied from the usage of trade. The plaintiff lived in this city and employed a broker here to sell his coffee, not under twenty-seven cents per lb. The broker took it to the defendants, auctioneers, and in four separate parcels receiving each

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time the defendants' note, in all near five thousand dollars. The broker only paid six or seven hundred to the plaintiff. The defendants never asked the broker whose coffee it was, because he and other brokers dealt in that way. It decides that leaving goods to be sold and receiving part of the price in advance, is not a pledge, but more like a sale; that the defendants if they knew the broker was not the owner might deal with him according to the usage, and the defendants had a power to sell irrevocable to repay themselves; and decides that it is wholly immaterial whether the advance made to the broker came to the hands of his principal or not.

This case was decided twelve years ago and was supposed to have settled the law. It was never complained of. The law of England is now by act of parliament made the same as this decision. So is the law of New York by a late statute. But what is more to the purpose, all the mercantile transactions of the community have been based on it. To overrule it would unsettle all the transactions under it. The law as there settled meets the universal idea of justice, and conforms to the usage of the whole mercantile world at this time. If other authority were wanting, it is found in the opinion of Justice Story, in *Evans v. Potter*, 2 Gallison, 13, according entirely with *Laussatt v. Lippincott*. The usage was acted on and fully proved by the plaintiff's witnesses, Jacob Thomas and James Martin, who swore they had advanced money to the plaintiff on these goods, had a right to send them by Hollinshead, and were not answerable to the plaintiff. This proves that goods left with a commission merchant, on an advance of money by him, are nearer being sold to him than pledged. And it proves they knew of and acted according to the usage at St. Jago in directing Hollinshead to leave the goods for sale, and take an advance on them. Now the usage proved, could justify them in this: nothing else. Again, every owner knew of the terms on which Hollinshead left the goods, and not one complained. It will be found that although Bispham and Burroughs and Archer each got back some of the goods left, yet that more or less of the goods of each of them had been sold by the defendants and passed to the credit of the advance to Hollinshead, and not one of them complained. If Hollinshead, though a bare consignee, had a right to employ the defendants to sell these goods and to account to himself, and to him they must account, *he [*222] could have sued them and recovered and they could not have set off a debt from Newbold to them to prevent his recovery. 18 John. 24, *Toland v. Murray*. Murray applied to Chancery for an injunction, but Chancellor Kent decided as the court of law did. 3 John. Chan. 569. See also *Assignees of*

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Dowding v. Goodwin, Cowp. 251. The sub-factor had agreed to account to the factor, who was answerable to the principal, and who had a right himself to retain against his principal for his own advances or responsibilities.

I have omitted the authority of Chancellor Kent, 2 Com. 489, of the first edition, and 626 of the second edition, because I will use it also for another purpose. He adopts the law as laid down in *Laussatt v. Lippincott* in the body of his work and the distinction there taken between a pawn strictly, and an advance from a commission merchant who receives to sell. In a note to page 491, he informs us, the law had been changed by statute in England, and since in New York, and says, 626, "a great deal may be said against the principle of the rule, and with the exception of England, it is contrary to the policy of all the commercial nations of Europe. On the continent of Europe possession constitutes title to movable property, so far as to secure *bona fide* purchasers, and persons making advances of money, or credit on the pledge of property by the lawful possessor." Now this proves, to my satisfaction at least, the law of St. Jago independently of the testimony given in this cause, and accounts for the statement of the witnesses, that they knew of no judicial decisions on the point. Courts never decide where no one disputes. The law is so well settled that the *lex loci contractus* governs in the construction and validity of a contract, though it is to be enforced by the laws of the country where suit is brought, that I shall not cite authority to support it. I cannot see then, how we can avoid saying, the plaintiff is bound by this contract, which is valid where it is made, and valid here too, if made here, unless we overrule *Laussatt v. Lippincott*.

Judgment reversed, and a *venire de novo* awarded

Cited by Counsel, 2 Wh. 490; 6 W. & S. 297; 2 Barr, 290; 4 Barr, 19; 5 Barr, 306, 334; 7 Barr, 389; 1 J. 167, 218; 2 J. 143; 7 H. 245; 12 C. 413; 2 Wr. 233; 3 Wr. 59; 8 S. 468; 13 S. 272; 14 S. 364; 15 S. 334; 16 S. 433; 22 S. 132.

Cited by the Court, 4 Wr. 243.

END OF DECEMBER TERM, 1832.—EASTERN DISTRICT.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT—MARCH TERM, 1833.

[PHILADELPHIA, MARCH 14, 1833.]

Harvey *against* Turner & Co.

IN ERROR.

Where an agent sells the goods of his principal on credit, taking a note for the price gives notice of the sale to his principal, and credits him in account with the amount of it, but omits to give notice of the non-payment of the note at maturity, the agent becomes responsible for the whole amount of the debt, and it is not necessary, to enable the principal to recover, that he should prove he has sustained any damage. The omission to give reasonable notice, makes the agent an insurer of the solvency of the purchaser.

WRIT of error to the District Court for the city and county of *Philadelphia*.

The defendants in error were plaintiffs below, in an action of *indebitatus assumpsit* brought against the plaintiff in error to recover back the sum of nine hundred and forty-three dollars and two cents, as money lent and advanced by the plaintiffs below to the defendant below. The main question in the cause was, which of them should bear the loss of that sum, which was the price of twenty-six bales of cotton sold by the plaintiffs on account of the defendant.

The plaintiffs were commission merchants in Philadelphia, and the defendant a merchant residing in Newbern, North Carolina. He was in the habit of shipping to the plaintiffs various

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articles of produce, such as rosin, molasses, cotton, &c., for the purpose of making sales and returns, and the plaintiffs occasionally shipped to him. In the month of September, 1822, the defendant shipped to the plaintiffs twenty-six bales of cotton for sale, and the plaintiffs, on the 13th of November following, [*224] sold them to one John Hastings on four months' *credit, taking for them the note of Hastings and wife. Hastings subsequently proved to be insolvent; the note was not paid at maturity, nor afterwards, and the amount of it constituted the sum in controversy.

It appeared in evidence that the plaintiffs carried on an occasional correspondence with the defendant, until September, 1823. They advised him of the sale on the 15th of November, 1822, and stated it in an account-current dated 31st of December, 1822, which was forwarded to him. But they did not advise him of the non-payment of the note until about the 26th of September, 1823, when the defendant being in Philadelphia, they handed him an account-current of that date, in which they charged him with the amount of the note, having credited him with it in the account-current previously rendered on the 31st December, 1822. It appeared in evidence also, that the plaintiffs were in the habit of rendering accounts-current to the defendant at the end of each year, or at the visit which the defendant annually made to Philadelphia. From the correspondence between the parties it was apparent, that the defendant had intended to be in Philadelphia in the year 1823 several months before he actually arrived. He had written to that effect, and was expected by the plaintiffs. No account-current had been rendered subsequent to the dishonour of the note prior to the arrival of Harvey in Philadelphia. The plaintiffs were largely in advance to the defendant, independently of the note when it arrived at maturity, and continued so until the 13th of October, 1823, when the sum of one thousand two hundred and sixty-two dollars and seventy-two cents, was paid to them, leaving unpaid and subject to controversy, nine hundred and forty-three dollars and two cents, the amount of the sale to Hastings.

It further appeared, that when the note fell due, the plaintiff refused to renew it. They saw Hastings in the city, and threatened suit. He promised to give them security. They pressed him for payment by letters written both by themselves and by their counsel, and on the 8th of August, 1823, obtained his bond and warrant to confess judgment in favour of the defendant as obligee, and on the same day entered up judgment against him in Delaware county, in which he resided; but in consequence of his incumbrances the judgment proved unavailable. This bond

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was tendered to the defendant in September, 1823, and in the month of November following this suit was commenced.

The defendant contended that Hastings was not worthy of credit: That the plaintiffs did not make proper inquiries as to his standing, and insisted on other matters of fact of which there was evidence, which went to the jury. In point of law he contended

1. That it was the duty of the plaintiffs as agents to apprise the defendant, their principal, of the non-payment of Hastings' note within a reasonable time, and that if they did not do so they must sustain the loss incurred.

*2. That it was the duty of the plaintiffs to institute [*225] legal proceedings against Hastings, in a reasonable time, and not having done so, the loss must fall upon them.

In delivering his charge to the jury, Barnes, president, after stating the evidence and giving his views of it, left it to the jury to determine in the first place, whether Hastings, at the time the plaintiffs sold to him, was entitled to credit, and if he was not, whether, in the next place, the plaintiffs being ignorant of that fact, used reasonable diligence and care in inquiring into his credit. He then stated to them, that if their opinion should be with the plaintiffs on this part of the case, then another question arose for their consideration, namely, whether the plaintiffs were bound to give notice to the defendant of the non-payment of the note within a reasonable time after it was protested, and if they had failed to do so, whether they had not assumed the debt. He instructed the jury, that in point of law the plaintiffs were bound by the implied contract of their agency to give such notice. He added, that this rule would be of easy and ready application if the exceptions to it were matter of law and not questions of fact, but the principle of the decisions of our Supreme Court was, that the jury are to determine whether the defendant has suffered damage from want of notice: That if he has sustained no damage the plaintiffs might recover notwithstanding their default: That it did not follow because nothing could have been recovered from Hastings at law, that the defendant had suffered no damage: That the jury were to determine whether anything could have been obtained in any way, from his wife, from his friends, by compromise, or more broadly still, whether the defendant had been in any way damnified by the want of notice: That if the defendant was in precisely the same situation without notice, that he would have been in if he had received it, he had not been injured by the plaintiffs' neglect, and consequently the default of the plaintiffs in this particular was no defense to the action: That if, as has been contended on the part of the defendant, the plaintiffs were bound in case they omitted to give notice to pur-

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sue the course of the law against Hastings, still the question would be whether the defendant had suffered loss : That if nothing could have been recovered by a suit at law, a suit was unnecessary, and if anything could have been recovered, then the defendant had been damnified by not having received reasonable notice of the non-payment of the note: That if the plaintiffs led the defendant to believe that the note was paid at maturity, and the defendant drew for that specific sum, or thereabouts, distinctly in consequence of a belief so produced, and the plaintiffs accepted the draft knowing that it was so drawn, then the plaintiffs had assumed the debt due from Hastings, and could not recover back the money.

The counsel for the defendant excepted to the charge, and the jury having found a verdict in favour of the plaintiffs, the present writ of error was taken out.

[*226] **T. Sergeant* and *Chauncey* for the plaintiffs in error, argued, that the court below had erred in laying down for the government of the jury a principle not sanctioned by authority, and dangerous in its character, as respects the relation of principal and agent, because it is calculated to deprive the principal of the power of defending himself against the acts of his agent. That principle was, that a jury could only give such damages as the principal could prove he had actually sustained. It is true that the general rule is, that an agent is responsible only for the loss he has actually occasioned, and that it lies on him who claims damages, to show the injury he has sustained. But there are cases in which a more rigid rule is applied, particularly for the benefit of commerce, and to insure the fidelity of those who must necessarily be employed to a great extent in the business of others. If the law were otherwise, the principal would be entirely at the mercy of the agent, who would have it in his power to cover negligence and fraud. That rule of law which calls for the performance of a known and admitted duty cannot be called hard or unjust. He who is visited with a penalty which is the consequence of his own act or omission, has no cause of complaint. This rule is in accordance with the principles which regulate agency, and with those of commercial law in general. The principal commits everything to the agent, and therefore the law holds the latter to a faithful performance of the trust. He must pursue his instructions, and if he departs from them the principal may either affirm or disaffirm his acts. It is an established rule, that where so important an event has occurred as the insolvency of a person to whom the agent has sold the goods of his principal, notice shall be given within a reasonable time. This rule is not difficult in its application.

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It may be necessary to leave to the jury the determination of the question as to what amounts to reasonable notice, but this is a matter well understood and perfectly familiar. In the case under consideration, the agents were in correspondence with their principal from the time of the maturity and non-payment of the note of the vendee, until the arrival of the principal in Philadelphia, a period of more than six months, and yet not a word is said about a matter so important to his interests. If notice had been given and proper measures had been taken, the whole or the greater part of the debt might perhaps have been secured. But the conduct of the agents was such as to lull the principal into security and make him believe that the debt was paid. Credit for the amount was given in account, the principal drew upon it, and nothing occurred for a long time to countervail the credit thus given. By this conduct the agents assumed the debt as their own, and rendered themselves responsible to their principal for the whole amount. There can be no objection to the rule contended for on behalf of the plaintiff in error, on the ground of policy, for it was always the policy of the law, to keep agents within bounds and make them attend to their duty. For the benefit of trade, it is necessary to hold commercial agents by stricter rules than those by *which other agents are governed. The principal can- [*227] not follow the course of his agent, or know what he is doing, except from information derived from the agent himself. It is impossible for him to show that by active measures more could have been obtained. The proof therefore ought not to be thrown on him. It would be to reverse settled principles, to decide that the agent is not bound to give notice of all occurrences important to the interests of his principal, and the principal can recover nothing but damages for the loss he can prove he has sustained by tracing the agent through all his windings. *Malyne* (Con. et Lex. Mer. 82) lays it down, that notice of sale is necessary, and surely it is of much more importance that notice should be given of the insolvency of the vendee. The rule for which the plaintiff in error insists, is analogous to that which governs many other cases arising under the commercial law. It is the law of bills of exchange and promissory notes. An indorsement is an engagement of guaranty, and if notice be not given within a reasonable time of the occurrence of the event on which the responsibility of the indorser is to arise, it is gone. This is a severe penalty, but if it were left to a jury to determine whether damage has accrued from want of notice, there would be neither certainty nor safety in the law. The law imposes the penalty on neglect of duty and presumes that injury has been the consequence of it. Formerly it was held that damage from the

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laches of the holder must be proved, but it is now settled otherwise. A case very seldom occurs in which loss is actually sustained in consequence of want of notice to the indorser, and yet the law strictly requires it. The rule as to abandonment for a total loss is of a similar character. If the insured means to abandon and claim for a total loss he must give early notice of his intention. All that is asked for on the present occasion is, that where the agent has treated the debt as his own, and credited his principal with the amount of it, he shall give reasonable notice of a change of intention. It is not only for the benefit of the principal that such rules prevail. The agent also has the benefit of them. If an account-current be sent to the principal and not objected to within a reasonable time, it cannot afterwards be objected to. So if the agent exceeds his authority, and informs his principal who makes no objection, he is considered as having adopted the act of the agent. Here the agent gives notice that the credit will become absolute in a given time gives no notice of the insolvency of the vendee and asks no allowance on account of his insolvency. The law regards him as having taken the solvency upon himself. They cited Paley on Agency, 5; Clark v. Moody, 17 Mass. R. 145; Chitty on Bills, 237; Jameson v. Swainston, 2 Camp. 546, note.

Scott, for the defendants in error, said, that the court below had charged directly in favour of the plaintiff in error as to the position that it was the duty of the agent to give notice to the principal of the insolvency of the vendee, but they added, that [*228] if no injury ensued *from such neglect of duty, no damages could be recovered, which implied that if any injury had been the consequence, damages might be recovered. No authority has been produced to show the existence of such a rule as has been contended for by the counsel for the plaintiff in error, that where a factor neglects to give notice of the insolvency of the purchaser of his principal's goods, he is to be amerced in the whole amount of the debt. Paley (on Agency, 37,) lays it down as a question depending on the circumstances of each case, whether injury has been sustained by the principal in consequence of the culpable neglect of the agent. Hammon v. Cottle, 6 Serg. & Rawle, 290, sustains the principle that the agent is not responsible for an omission of duty, where the loss would have been the same if that duty had been performed; and Gibbs v. Cannon, 9 Serg. & Rawle, 199, decides the analogous point, that on a guaranty of a promissory note, drawn and indorsed by others, it is not necessary to give notice of non-payment to the guarantor where the drawer and indorser are insolvent when the note becomes due, their insolvency being *prima*

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facie evidence that the guarantor was not prejudiced by the want of notice. He also cited *Child v. Corpe*, 1 Payne, C. C. R. 289; *Murray v. King*, 5 Barn. & Ald. 165; Co. Litt. 198, a.

The opinion of the court was delivered by

ROGERS, J.—This was an action of *indebitatus assumpsit*, brought to recover certain advances made by the plaintiffs to the defendant under the following circumstances: The plaintiffs, who reside in the city of Philadelphia, were the factors or consignees of the defendant, who resides in North Carolina, and by orders of the defendant, on the 13th of November, 1822, sold twenty-six bags of cotton, to a certain John Hastings at a credit of four months. The 17th of November the plaintiffs advised the defendant of the sale, and on the 31st of December transmitted their account to the defendant, debiting him with their advances, and crediting him with the amount of sales. The whole amount was paid to the defendant. The debt due from Hastings was ascertained to be bad, on the 15th of March following, at which time Hastings' note was protested for non-payment. Although several letters passed between the parties, no claim is made on account of non-payment, nor is there advice given or notice of the fact of protest, for upwards of six months. The defendant alleges that the factors were guilty of negligence in making sale of the cotton; that they were negligent in giving notice of the insolvency of Hastings, and also, in their endeavours to obtain payment after the sale.

It is admitted that the first point was properly left by the court as a fact for the decision of the jury. But the defendant complains of the charge of the court which in effect was, that the defendant shall repay the money advanced unless the defendant can show that he had suffered damage by the negligence of the plaintiffs. By the charge of the court, the onus is thrown upon the principal, whereas *the defendant contends, that the factors in giving credit, and neglecting [*229] to give notice of the non-payment of the note, assumed the debt to themselves. It is a rule of law which does not admit of dispute, that an agent is bound to keep his principal informed of all material occurrences in the agency. If he fails to do so, it is negligence and a palpable violation of duty for which the factor is clearly liable to suit. It was, then, the duty of the plaintiffs, to inform the defendant in a reasonable time, and particularly after having credited him in account, of the non-payment of the note. For this the defendant had a right of action, but, according to the charge, he could not recover even nominal damages, unless he could make it appear, that he had sustained some damage by the want of notice. We cannot ac-

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cede to this view of the case, for a strict adherence to the rule, is in our opinion necessary to insure a faithful performance of the trust. If a factor sells, and credits the principal with the amount of sales, of which he advises his principal, and fails within a reasonable time to give notice that the debt is bad, he becomes an insurer for the whole amount. And this rule is required by a due regard for the security of the principal, for otherwise, such is the power necessarily intrusted to an agent, that he may be guilty of any degree of negligence or of fraud with impunity, unless the principal is able (which is frequently impracticable) to prove special damage, and the extent of it. A merchant in Philadelphia, makes a shipment to his factor in London. The factor advises him of the sale of the goods at a credit of three or six months, and at the same time credits him with the amount of sales, in his account-current. The factor neglects to inform him of the non-payment of the note at maturity. Surely he has a right to conclude that the bills were paid when due. He acts on this natural supposition; carries on his business as usual; draws bills on the faith of the funds which he fancies he has in the hands of his factor in London, and is afterwards informed at the end of six or twelve months (for there is no limit) that he has been under an entire mistake, that although he, the factor, neglected to inform him of it, yet the vendees of the goods were insolvent, and not one cent of the amount has been received. If this be allowed it is obviously a power which may be used either negligently or by design, to the utter destruction of the principal. His whole operations may be destroyed by the failure of the agent to perform an admitted duty, in a manner which it may be difficult if not impossible to show to a court and jury. It is a beneficial principle which visits such neglect with a strict penalty. Time is of consequence to the commercial world, and it is important to them to be regularly and early advised of all material circumstances in relation to business intrusted to foreign factors and agents. Nor does the rule impose any unnecessary hardship. It calls merely for the strict performance of a well known and acknowledged duty. A party who negligently or wilfully omits to do that which the law requires, and with which it is so easy to comply, has no right to complain. There was no other rational [*230] mode of accounting *for the silence of the plaintiffs, but on the supposition that the money had been paid, or that the agent had assumed the responsibility on himself. Harvey had a right to believe, and act under the belief, that Hastings' note had been paid, or that such arrangement had been made, as to assure the payment of the debt. In most cases of agencies, it is true, that the measure of damages is the injury

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which the principal can show he has sustained, and this has been abundantly shown by the cases cited in the argument. But there are cases, of which we conceive this to be one, where it has been found wise, and indeed necessary, in the due transaction of commercial business, to establish rules somewhat arbitrary in their nature, and partaking in some degree of strictness and severity in their operation. Some of these provide for the benefit of the agent, others for the security of the principal. If an agent forward his accounts to his principal, who does not in a reasonable time object to them, he thereby consents, and is bound by them. If he transcends his authority, and the principal fails, within a reasonable time after knowledge, to disaffirm the transaction, he ratifies the act of the agent. If a principal directs his agent to make insurance, and he omits to do so, the agent becomes the insurer. When there is an abandonment the insurer pays for a total loss. To make a drawer liable on a bill of exchange or promissory note, it is requisite to give him due and seasonable notice of their non-acceptance or non-payment.

These are acknowledged principles of commercial law, for which it is needless to cite authority. So in *Malyne*, 82, it is said, "If a factor do sell unto a man certain goods of another man's account, either by itself, or among other parcels, and this factor giving not advice unto the owner or proprietary of the sale of the said goods, but afterwards (having had more dealings with that man in selling of goods and receiving of moneys) this man cometh insolvent; the factor is to make good that debt for the said goods so sold, because he gave no advice to the owner of the sale of the said goods, at convenient time, even as if he had sold those goods unto a man contrary to the commission given unto the man; for the sale of factorage binds him hereunto." Further, it has been decided, that after a loss has happened, an agent is bound to give his principal the earliest notice of the insolvency of the underwriters, with whom he has effected policies of insurance on behalf of his principal, in order that the latter may enforce his claim, and take such steps as he may think proper for his own security. A failure to do so makes the agent liable for the whole amount of the insurance. *Jameson v. Swainston*, 2 Camp. 546, n. In many of their circumstances, the cases are precisely alike, and many of the remarks of Mansfield, C. J., are strictly applicable here. As in *Jameson v. Swainston*, we are of the opinion, that after so great a lapse of time, between the time of ascertaining the insolvency of Hastings, and rendering the last account, the factors, as between themselves and the principal, must be presumed either to have received actual payment of the note, or *to have settled with him in account. For the purpose of [*231]

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recovering from the defendant, the plaintiffs should, in a reasonable time after the protest of the note, have apprised him of the inability of Hastings to pay, whom he was naturally led to believe by the plaintiffs, had settled with the factors. Their silence deprived him of all opportunity through the instrumentality of others, or by himself, of endeavouring to obtain payment of the note. The silence of the factors is an answer to their demand against the principal, and they must look for indemnity to Hastings, whom they have trusted. The steps afterwards taken to recover the money, it is unnecessary to examine, for they cannot avail the plaintiffs, inasmuch as they have neglected to give notice of a fact so material for the security of the principal. It may be proper further to state, that I have examined the testimony with care, and cannot discover that the defendant at any time affirmed the conduct of the plaintiffs.

HUSTON, J.—This case presents a single point. Harvey, who lived in North Carolina, sent cotton, rosin, &c., to Turner & Co., and drew on them for the price, or received merchandise. About once a year Harvey came to this city, and a settlement of the previous year took place.

In the autumn of 1822, he sent some cotton to Turner & Co., who sold it to J. Hastings at four months, and took his note to J. Harvey, and informed Harvey of this.

Before the note fell due, J. Hastings was unable to pay. Turner & Co. pressed him much; obtained a mortgage on his property and his wife's estate, and then a bond and warrant to confess judgment, and entered judgment in Delaware county, where Hastings lived.

Harvey came to this place in August or September, 1823, and received an account-current from Turner & Co., by which he was indebted to them about one thousand dollars. To this, for some time, he made no objection. In it he had no credit for the amount of Hastings' bond and judgment, which, as well as the previous note, were in the name of J. Harvey. After some time, Turner & Co. brought suit. The defence was, that from their conduct they were liable to J. Harvey for the price of the cotton sold to Hastings.

The judge left it to the jury to ascertain whether, as Hastings was unknown to Turner & Co., they made the proper inquiries, and received such answers as to his character and standing, as justified them in selling to him on credit, and the jury found for the plaintiffs on this point. There was an allegation of negligence against the plaintiffs, in not informing Harvey that Hastings' note was not paid at maturity, and that he was likely to fail; or, in fact, was hopelessly insolvent. And the court told

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the jury, that if from this neglect of information Harvey supposed the note was paid at maturity, and on that supposition drew for the amount, or thereabouts, distinctly on this supposition, and the plaintiffs accepted the draft, knowing it *was so drawn, they made the debt their own, and could [*232] not recover. The jury on this point also found for the plaintiffs.

The court also told the jury, that it was the duty of the plaintiffs to inform Harvey promptly, that the note was not paid at maturity, and was in danger of being lost, and for not giving such information the plaintiffs might be liable. And further, that it was the duty of the plaintiffs to commence suit against Hastings if the note was not paid, and no orders were received from Harvey, and for not doing this, the plaintiffs might be liable; but that if the jury found from the evidence, that Harvey sustained no loss from want of notice, or from no suit being commenced (as a mortgage and judgment were obtained, in less time than they would have been had by adverse suit), that the plaintiffs were not liable. The court put it strongly to the jury, that if Harvey by coming on could have used any means not resorted to by Turner & Co., could, from Hastings or his friends, by suit or compromise, have recovered the debt or part of it, in short, if Harvey was in any way damnified, by want of notice, the plaintiffs were liable; but if, from the evidence, everything was done by Turner & Co. which could have been done, if Harvey is as well off as he could have been if he had received notice, then he has not been injured by want of notice, and must bear the loss. Here the jury found for the plaintiffs, and the only error assigned is, that the court erred on this last point, and ought to have instructed the jury, that for neglecting to give notice of non-payment of the note, Turner & Co. were absolutely bound to make it good to Harvey. Although this was the only point which arose in this cause, in which error is assigned, yet much was said on the other points; and perhaps if on those points the jury had found differently, it would have been as satisfactory to the judge who tried the cause; but as he did not grant a new trial, we cannot legally even take that matter into consideration. The counsel for the plaintiffs have not cited any authority to show that the judge charged contrary to law. For although an old writer, Malyne, was cited to prove that a factor or agent ought to keep his principal informed of the state of his business, yet neither that author, nor any other cited, or which I have seen, states the broad position, that neglect to write or give information of every occurrence, of itself and without other proof, will make a factor liable in every case, and to any amount. The case cited from 17 Mass. Rep.

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183, only proves, that omitting to write, together with other circumstances, may make a factor liable. There, the whole of the circumstances were left to the jury. Paley in his Treatise on Agency, has said, in more than one place, that an agent ought to apprise his principal of the state of his business, and of any important occurrence; but he also states, that to render an agent responsible for loss or damage, "it must be a real, and not a supposed or probable injury merely; and therefore an agent is not liable for the neglect of an act, expressly directed, if the act when performed would not have entitled his employer to any [*233] legal benefit, but only *have conferred a probability of advantage." Paley, 8. And again, page 37: "It is of consequence to an agent, in consulting his own indemnity, to apprise his principals with convenient expedition, of all material acts done, or contracts concluded by him. It must in general be a question to be decided according to the particular circumstances of each case, whether the culpable delay of the agent in this respect has occasioned injury to the principal."

It was contended here, however, that by analogy to other cases, the agent ought to be liable; and one of these cases was, that a factor who was ordered to insure, and did not, was liable as insurer. In the first place, the position is too broadly stated. It is only in particular circumstances and situations, that an agent is so liable. *French v. Reed et al.*, 6 Binn. 308; Paley, 18, 20, and following pages. And an agent is not liable at all events, but may use any defence which an insurer could; for if nothing could have been recovered on the policy, no damage has been sustained by default of the agent. The plaintiff must prove the amount of his interest and the loss, and the defendant may avail himself of a deviation in the voyage or the illegality of the intended insurance. But what is nearer to the present case, if the agent having difficulty in procuring insurance, employ a broker, who refuses to give up the policy, receives the money from the underwriters, and becomes insolvent, the agent is not liable, if the broker had been of good standing; and the agent was not bound to bring an action for the detention of the policy. Paley, 22.

The counsel also compared this to the case of notice on bills or notes, which must be given in almost all cases, or the person omitting to give it must bear the loss. The answer is, that is a peculiar case, depending on general principles, and more on positive decisions in some cases, and does not apply even to a surety or guarantor, except one whose name is on mercantile paper. See *Gibbs v. Cannon*, 9 Serg. & Rawle, 198, and cases there cited.

The very principle of this case, was decided by this court in

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Hammon *et al.* v. Cottle, 6 Serg. & Rawle, 290. There the defendant lodged the plaintiffs' money with P. and informed them of it; and it does not appear he ever after took any other step in the matter. The plaintiffs drew for the money on P. who lived in Paris, where the agent was. The bills were not honoured. Nothing was done by the agent to get the money from P., and yet he was not held liable, because the total insolvency of P. was found to be such, that any attempt to obtain compensation from him would have been fruitless.


The same principle runs through all our cases. The guarantor is not liable unless the money could not be obtained from the principal; but if the principal was totally insolvent, you can recover from the guarantor without having sued the principal, or given notice of his insolvency, Gibbs v. Cannon, 9 Serg. & Rawle, 198; for the omitting to sue or give notice, was no injury to the guarantor.

If the surety in a bond requests the obligee to sue the principal, or *he (the surety) will be no longer liable, and [*234] the principal is not sued, the surety will generally be discharged, but if the obligee can show, that a suit against the principal at the time of notice would have been wholly unavailing, the surety remains liable. Gardner's Admrs. v. Ferree, 15 Serg. & Rawle, 30. I know of no case, except that of giving notice to a person whose name is on mercantile paper, in which one man is liable to another for a mere omission to do an act, when that act would have produced no benefit to the party complaining; and whether it would have produced any benefit, must always depend on the circumstances of the case, and so be a matter for the jury. I am therefore of opinion there is no error in the decision of the District Court.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 10 Barr, 106; 5 H. 324; 11 H. 23; 13 Wr. 328.

Cited by the Court, 4 W. 315; 6 W. & S. 411; 14 S. 363; 15 S. 123; 11 W. N. C. 74; 12 W. N. C. 88.

Commented on, in 6 Wh. 23, and though sustained, is spoken of as an exception to the general rule. 

[PHILADELPHIA, MARCH 18, 1833.]

Hutchinson and Others *against* Sandt and Others.

APPEAL.

An inquisition taken under a commission in the nature of a writ *de lunatico inquirendo*, finding that a person is of unsound mind, and has been so for a

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certain space of time prior to the finding, is *prima facie* evidence to show that a deed purporting to have been executed by such a person during that period, is invalid on the ground of the mental incompetency of the grantor.

It is, however, only *prima facie* evidence, and may be rebutted by the testimony of those who were acquainted with him during the period in question, and knew him to have been of sound mind, or at least to have had lucid intervals, and that the deed was executed by him during one of those intervals—

And the members of the inquest who found him to be of unsound mind, are competent to prove such facts, so far as they are within their knowledge, but they cannot be examined for the purpose of proving what they conceived to be the nature of their finding, and that they did not intend to find or represent that he had been of unsound mind for the space of five years anterior to the inquisition, or that they did not know until after their report had been made, that it was retrospective in its operation.

ON an appeal from the judgment of the Circuit Court of Northampton county, held by Huston, J., in April, 1831, it appeared that this was an ejectment for one-sixth part of a tract of land containing two hundred and forty-four acres and nineteen perches, in Lower Mount Bethel township.

It was admitted that John Hutchinson died seized of the premises in dispute, and the plaintiffs proved that they were the children of Andrew Hutchinson, also deceased, who was one of the six children of the said John Hutchinson.

After having proved their pedigree, the plaintiffs gave in evidence the proceedings under a commission in the nature of a writ *de lunatico inquirendo* awarded by the Court of Common Pleas of Northampton county, by which the said [*235] Andrew Hutchinson was found *non compos mentis*. The inquisition was taken on the 20th of February, 1818, and found “that the said Andrew Hutchinson at the time of taking this inquisition, is of unsound mind, memory, and capacity, so that he is not capable of governing himself or managing his estate, and that the said Andrew Hutchinson hath been in the said state of unsound mind, memory, and capacity for the space of five years last past and upwards: That he is of the age of thirty-four years and upwards, and is lawfully seized in his demesne as of fee of and in a certain tract of land situate, &c., containing one hundred acres be the same more or less; possessed of personal estate of the value of two hundred dollars or thereabouts, and in right of his wife Jane, entitled to one-eighth part of the real and personal estate of Nathaniel Brittain, deceased, subject to the dower or thirds of the widow of the deceased therein: That he has not alienated any of his estate during his incapacity to the knowledge of the inquest,” &c.

On the 24th of April, 1818, this inquisition was confirmed by the court, and committees of the person and estate appointed.

The defence relied upon was, that Andrew Hutchinson was not

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a lunatic, but was merely subject to fits, in the intervals between which, he was competent to the transaction of business: That he was in the habit of going to frolics, hauling stone, wood, and the like, and to raisings in the neighbourhood: That he went to church, and was a member of the church: That in the year 1817 he joined in a deed with his brothers and sisters to convey all the estate of their father to James and William Hutchinson, the administrators of their father's estate, for the purpose of completing a family arrangement which had been entered into in his lifetime, by which a part of his land was to be sold for the payment of debts and the residue to be conveyed to his children who were to pay money to him: That the land in dispute was the part designated for the payment of debts, and in pursuance of this arrangement had been sold to John Sandt, one of the defendants, who had paid a high price for it: That Andrew Hutchinson had received the tract which had been designated for him, and that his family had destroyed the timber on it.

On the trial, the defendant's counsel offered John Jacoby and Morris Morris, two members of the inquest who had joined in the inquisition, as witnesses, to prove, not only the state of Andrew Hutchinson's mind and his capacity to transact business, but that at the time of signing the inquisition they did not mean to overreach the period of five years. The evidence was objected to by the counsel for the plaintiffs, but the objection was overruled by his honour, and the witnesses were sworn and examined. An exception was taken to his opinion which he noted.

A great mass of other evidence was given on both sides in reference to the questions growing out of the controversy, but as the argument here, was by the direction of the court restricted to a single *question, upon which alone the court gave [*236] an opinion, it is deemed superfluous to give a statement of it.

The jury under the direction of the judge, found a verdict for the defendants, and the plaintiffs moved for a new trial, for which they filed eighteen reasons, twelve of them founded on the admission or rejection of evidence, and six on the charge of the court.

The tenth reason, which alleged that there was error in admitting the evidence of John Jacoby and Morris Morris, is the only one which is now material.

The Circuit Court, having refused a new trial, an appeal was entered to the court in bank.

Brook and J. M. Porter for the appellants.—A strong disposition has been for some time manifested by our courts, to narrow the limits of the rule by which parol evidence is permitted

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to be given to affect a written instrument of any kind, and the objections to it are more numerous and striking in reference to a record, than to any other written instrument. That a record, properly so called, can be impugned by such evidence, will not be pretended. The record of an inquisition in a case of lunacy, it is true, in some respects differs from an ordinary record. It may be disputed in the manner prescribed by law, but the evidence for that purpose ought to be direct and clear, derived from unquestionable sources, and given in the proceeding which the law provides as a remedy for errors in such cases. An inquisition when confirmed and recorded, is to many purposes a record, and incapable of contradiction by parol evidence. It may be traversed, but cannot be overhauled or inquired into collaterally. In this respect there is no difference in principle between such a record, and the record of an ordinary verdict. If it could be destroyed collaterally by parol evidence derived from any source, records would be brought into contempt, and a door opened to fraud. No case can be found, in which the record of an inquest under a commission of lunacy has been permitted to be contradicted by parol evidence in a collateral suit, but, on the contrary, in the case of *Selin v. Snyder*, 7 Serg. & Rawle, 172, evidence of a similar character in reference to the analogous case of proceedings in the Orphans' Court for the sale of an intestate's lands, was held to be inadmissible. Still less can it be contradicted or its effects destroyed by a juror, who was himself a party to it. A juror who has concurred in rendering an ordinary verdict, it must be conceded on the opposite side, cannot be heard in opposition to it. He may be heard to sustain, but not to impeach his verdict. He cannot be permitted to say, he did not mean to find what his verdict declares he did find. This is a rule well established by the policy of the law, and which the safety of those whose interests are involved in legal proceedings, requires should remain unshaken. If it were otherwise, it would strike at everything dear to the community; it would furnish a temptation to tampering with jurors, and put it in the power of one man [*237] to swear away the title of another, derived under the solemn act of the witness himself, when filling another character. In this point of view, the policy, and consequently the law, in respect to inquisitions and other verdicts, are the same, however they may differ in other respects; yet the Circuit Court permitted jurors, after the lapse of eleven or twelve years, to destroy their verdict, by swearing they did not mean to do what they have sworn they have done.

If the plaintiffs did introduce the record in the first instance, that, even if an error, would not justify the error of permitting a record to be collaterally impeached, particularly

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by those who participated in making it. If the inquest was wrong, those who felt themselves aggrieved by their finding, were not without remedy. An application to the court under whose authority the proceeding took place, if made in due time, and in the proper manner, would have put right whatever was wrong. A traverse is the established remedy in such cases. It is, however, now too late to interfere with the inquisition, even before the proper tribunal, and in the regular mode. A chancellor, after such a lapse of time, would not listen to an application of the kind. If the principle contended for on the other side be established, the precedent will be full of mischief. Legal proceedings, instead of quieting controversies, will only be the commencement of endless litigation. *Dana v. Tucker*, 4 John. R. 487; *Cluggage v. Swan*, 4 Binn. 150; 3 Stark. Ev. 1043, 1278; Add. Rep. 380; *Campbell v. Wallace*, 3 Yeates, 572; *Iddings v. Iddings*, 7 Serg. & Rawle, 115; *Reed v. Jackson*, 1 East, 355; *Wolverton v. The Commonwealth*, 7 Serg. & Rawle, 283; 2 South. Reps. 486; 14 Mass. Rep. 246.

Hepburn and Jones for the appellees :—The jurors were called, not to impeach their verdict, but to show that in point of fact, it was not as it was rendered. Their evidence was intended to correct a mistake in their finding, and make it appear what it really was. For this purpose they would have been competent witnesses, even if this had been an ordinary verdict, and not an inquisition. *Jackson v. Dickson*, 15 John. R. 309; *Cogan v. Ebdlen*, 1 Burr. 383; *Rex v. Simmons*, 1 Wils. 329; *Smith v. Cheetham*, 3 Caines, 57; *Ford v. Simpson*, 8 Pick 359. But there is no analogy between an inquisition like this and a verdict, which is a record, and cannot be contradicted. An inquisition is an *ex parte* proceeding, and differs essentially from a verdict. There is no principle common to both. The object of the inquisition is to deprive the lunatic of the possession of his property. It does not pass a right as a verdict does, and is traversable. A jury in an ordinary case find their verdict under the charge of the court, which an inquest do not: they are confined together until they render their verdict, which an inquest is not; their verdict will be set aside if they have intercourse with others, which is not the case in respect to an inquisition. An execution follows a verdict, but not an inquisition. If then it were universally true, that a juror could *not be heard [*238] in opposition to his verdict, which is denied, the rule would not be applicable to an inquisition in a case of lunacy, which never acquires the sanctity of a record. It is conclusive of nothing. It is only *prima facie* evidence, and may be controverted by other evidence. Acts done during a lucid interval

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are binding, though done during the period covered by the inquisition. Col. on Lun. 169, 162, 168, 182, 389, 390, 395. If this be so, there must be a time and a mode of showing the existence of a lucid interval, and this can only be done as it was in this case. The object of the defendants was to show, that the arrangement under which they derived title was made and carried into effect during a lucid interval. It is obvious then, that a traverse could have afforded them no relief, for the inquisition found that Andrew Hutchinson was of unsound mind, and said nothing about lucid intervals. If it had been traversed, it must have been set aside altogether, or not at all, and of course the object would have been defeated. It could be disputed in reference to a matter of this kind, only when offered in evidence on the opposite side. Both the jurors who were examined denied that the finding was as the inquisition declared, and it is difficult to discover a reason why they should not be permitted to tell the truth, and declare what their finding really was. If they are not suffered to do so, the plaintiffs are enabled to take advantage of their own error. They first called two of the inquest to support the inquisition, before it had been given in evidence against them, and if it was proper for them to give such evidence, the defendants clearly had a right to rebut it, by opposite evidence of the same kind.

But if the defendants are estopped by the record, so are the plaintiffs, for estoppels are mutual. The inquisition finds that the lunatic, while he was a lunatic, never aliened his lands. Nevertheless, the plaintiffs undertake to show that he did. If the inquisition is to be opened for one party, it must be for the other; and if it was competent to the appellants to show that the alienation was during the period when his lunacy is supposed to have existed, it was competent to the appellees to show that it was done during a lucid interval.

The opinion of the court was delivered by

KENNEDY, J.—A number of reasons have been assigned by the counsel of the plaintiffs, who are the appellants, why the verdict should be set aside and a new trial granted in this case, many of which do not appear to be sustained in fact, and none of the whole both in fact and law, in the opinion of the court, excepting the tenth; which is, that the Circuit Court erred in admitting the evidence of John Jacoby and Morris Morris. So far as the evidence of these two witnesses, who had been members of an inquest and joined with their fellows in signing and sealing an inquisition, on the 20th of February, 1818, wherein they reported Andrew Hutchinson to be of unsound mind, memory, and capacity, so that he was not capable of govern-

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ing himself, or of managing his estate, and that he had been *in that state of mind for the space of five years then last past and upwards, was admitted to show what they [*239] conceived the nature of their finding in their report to be, and that they did not intend thereby to find or represent that he had been of unsound mind, memory, and capacity, for the space of five years anterior to that date, or that they did not know until after their report had been made, that it was retrospective as to the state of Andrew Hutchinson's mind, this court think it ought not to have been received. The inquisition had been given in evidence by the plaintiffs, to show that Andrew Hutchinson was, at the time the deed of conveyance purported to have been executed by him, to wit, on the fifteenth of November, 1817, and under which the defendants claimed, of unsound mind and incompetent to make such an instrument. It was doubtless admissible for this purpose, although entirely an *ex parte* proceeding as respected the grantees in the deed, but for this reason of its being *ex parte*, it is only *prima facie* evidence, at most, of Andrew Hutchinson's insanity, and liable to be rebutted and done away by the testimony of those who were acquainted and conversant with him during that period, and knew him to be of sound mind, or that he had at least lucid intervals, and that the deed was executed by him at one of those times. Jacoby and Morris, notwithstanding that they had, as members of the inquest, joined in executing the inquisition, were still competent witnesses to testify to his sanity or insanity at any time of their own knowledge, or to his having lucid intervals, or to any facts, conduct, and conversations of his, during that period of five years, and especially at the time of executing the deed, which came within their knowledge and observation, and from which the sanity or insanity of the party might have been fairly inferred by the jury. But to permit them to explain away the legal effect, and to contradict the tenor of their report, after it had been made to the court and confirmed; or to testify that they conceived it to be of quite a different import from what it really was; or that they signed it without knowing that it contained a statement which they did not know to be true, or knew was not so, would, as it appears to me, be attended with serious and dangerous consequences. It would be permitting members of an inquest to prove what, if true, ought justly to subject them to very severe censure. As members of the inquest, they were bound by law, as well as their oaths, to make a careful and diligent inquiry into the truth of the matters submitted to them, and to report nothing to be so, but what they had credible evidence of, and firmly believed to be true. It is, I conceive, upon the ground of this care and diligence in their search after truth,

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that such great credit and effect are given to their report, as to make it *prima facie* evidence, even against those with respect to whom it is altogether an *ex parte* proceeding. Indeed, after a lapse of a few years, when time and other causes shall have removed all rebutting testimony that existed to their finding, its being admissible as evidence may in effect be said to have [*240] become conclusive, and hence the necessity and *absolute propriety of the utmost care and circumspection being observed upon the part of the members of an inquest, to avoid setting forth any matter or thing unless convinced of its truth by credible evidence. We must presume, that these witnesses as members of the inquest discharged their duty upon these principles. Under this view then of the matter, it appears to me, that they ought not to be permitted to testify to their own criminal neglect of duty or misbehaviour, more than jurors. In the case of *Cluggage v. Swan*, 4 Binn. 150, it was ruled by this court, that jurors were not admissible to invalidate their verdict on the ground of misconduct; and by the Common Pleas of the city and county of Philadelphia, in *Willing v. Swazey*, 1 Browne's Rep. 123, the same principle was settled.

I do not consider this doctrine impugned by the decision in *Ritchie v. Holbrooke*, 7 Serg. & Rawle, 458-9, where it was merely ruled that the affidavit of a juror might be received to prove the misbehaviour of one of the parties to the suit. Besides regarding it as a record or registry made at the time by those members of the inquest who signed and sealed the inquisition, of what they had done, and what upon full investigation and consideration of the evidence then given they found to be true, would it not be most dangerous for the cause of truth, to substitute their recollection for their report? It might in effect be preferring parol evidence, proceeding from the frail and treacherous memory of witnesses, to that which may well be considered as partaking of the nature of record evidence; because it would be submitting both to the jury who might think proper to prefer the former to the latter, and to build their faith upon it accordingly. Judicial experience, public policy, the security of public and private rights, reason and common sense, all combine against the substitution or admission of such evidence. The decision of the Circuit Court, overruling the motion for a new trial, is reversed, the verdict set aside, and a new trial granted.

New trial granted.

Cited by Counsel, 6 W. & S. 460; 7 W. & S. 244; 6 Barr, 373; 6 S. 372; 24 S. 247; 28 S. 412, s. c. 1 W. N. C. 585; 10 N. 320, s. c. 8 W. N. C. 40; 2 W. N. C. 674; 14 W. N. C. 327.

Cited by the Court, 2 J. 161; 7 C. 245; 4 S. 224; 20 S. 235; 24 S. 248.

Approved, 2 H. 428.

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Brentlinger *against* Brentlinger.

APPEAL.

On an appeal from the decree of the Court of Common Pleas on a petition for a divorce, an affidavit that is not intended for delay, must be filed.

But such an affidavit is not a pre-requisite to an appeal. Until the affidavit is filed, the appeal is not complete, but the court will not dismiss the appeal on the ground that such an affidavit has not been filed with the record, where the defect has been supplied during the term (even if the court be sitting by adjournment) and before motion to dismiss the appeal.

THERESA E. BRENTLINGER, by her next friend John C. Guldin, presented a petition to the Court of Common Pleas of *Montgomery* County, praying for a divorce and alimony, which the court decreed. The respondent, John Brentlinger, entered an appeal to this court. On a previous day, *Rawle, Jr.*, for the appellee, obtained a rule to show cause why the appeal should not be dismissed, because no affidavit was made by the appellant, and filed with the record, that the appeal was not intended for delay.

Brewster, for the appellant, argued against the rule.

The opinion of the court was delivered by

ROGERS, J.—This is an appeal from the sentence of the Common Pleas, of *Montgomery* county, decreeing a separation from bed and board and alimony. The decree was made the 28th of November, 1822, and the appeal taken by the respondent, was filed in the Supreme Court, the 12th of January, 1833, and the affidavit was filed the 5th of March, 1833. The case comes before the court, on a rule, granted the 11th of March, 1833, to show cause why the appeal should not be dismissed, because no affidavit was made by the appellant, and filed with the record, that the said appeal was not intended for delay.

In *Kreider's Case*, 3 *Rawle*, 205, it was decided, that an appeal to the Supreme Court, should be filed at the next term after it was taken, yet, if it be done during the actual session of the court, whether sitting by adjournment or otherwise, it is in time. The court was sitting by adjournment the fifth of March, 1833, so that the appeal, although not perfect at the time the record was filed, was perfected the same term at which it was taken. The act of the 11th of March, 1809, which directs the oath or affirmation, prescribes, that any person appealing, or purchasing any writ of error, shall make oath or

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affirmation, to be filed with the record, that the same is not intended for delay. It is the usual, and certainly the most convenient practice, to make the affidavit when the party appeals or [*242] purchases his writ of error, and to file it at the time he files the record. But this is not a pre-requisite to an appeal, or writ of error. The party will be permitted to retrieve a slip of this kind, provided it is done in proper time. Until the affidavit is filed the record is not complete, but the court will not dismiss the appeal, where the defect has been supplied during the term, and before motion. If the case requires an earlier action, the object of the appellee may be obtained on motion.

The objection, that an affidavit is not required, was not much pressed. The act of 1809 is general, and requires an oath or affirmation in all cases of appeals, or writs of error. I see nothing in the act of 1815, which shows that the legislature intended that an affidavit should be dispensed with in a case like the present.

Rule discharged.

Cited by Counsel, 2 Wh. 94.

[PHILADELPHIA, MARCH 29, 1833.]

Craft for the Use of Powell *against* Webster.

IN ERROR.

An assignment purporting to transfer all the right of the assignor in a sum of money charged, by agreement, upon land, in lieu of a widow's dower, the interest of which is to be paid to the widow during life, and the principal, after her death, to the assignor and others, is not within the meaning of the recording act of the eighteenth of March, 1775, and therefore it is not necessary that it should be acknowledged, or proved and recorded under that act, in order to preserve its validity against a subsequent assignment for a valuable consideration, without notice.

It seems, that an assignment of a mortgage, is not within the provisions of the act above mentioned.

It seems too, that it is not necessary that an assignment of a mortgage should be in writing.

A deed, purporting to convey all the right and title of the grantor to land of which he had previously parted with the fee simple, reserving only a right to a portion of the purchase-money charged upon the land, does not pass his interest in the money so charged.

THIS case came before the court on a writ of error to the Court of Common Pleas of *Montgomery* County, in which it was an action of covenant, brought by John Craft for the use of William Powell against William Webster.

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When the cause came on for trial, the counsel agreed that the jury should find a verdict in conformity to the opinion of the court, upon a case to be stated, in the nature of a special verdict. It was in substance as follows :

Jonathan Craft and Mary his wife, George Craft, John Craft and Elizabeth his wife, Edward Holcombe and Ann his wife, and Jacob Craft, by indenture dated the first of April, 1817, and duly recorded, granted and conveyed the premises therein mentioned, to William Webster, the defendant, in fee, "under and subject to the dower *of Esther Craft, to be paid [*243] to the said Esther Craft, or to her assigns, out of the same, it being estimated at the sum of one hundred and forty-four dollars and seventeen cents, yearly and every year hereafter, for and during the term of her natural life only, and also under and subject to the payment of the sum of two thousand four hundred and twelve dollars and forty-eight cents out of the same, at and immediately after the decease of the said Esther Craft, unto the heirs of John Craft aforesaid, deceased, and to the heirs of Jacob Craft aforesaid, deceased, their heirs, executors, administrators, and assigns, according to their several and respective legal shares and proportions thereof, being part of the consideration-money aforesaid : and also under and subject to the payment of the lawful interest of the above-mentioned sum of six hundred and forty-four dollars and seventeen cents, out of the same, to Alice Craft aforesaid, widow of Jacob Craft, deceased, yearly and every year, during the term of her natural life only, or to her assigns during the said term, and also under and subject to the payment of the said sum of six hundred and forty-four dollars and seventeen cents, out of the same, at and immediately after the decease of the said Alice Craft, unto the said Jonathan Craft and Mary his wife, George Craft, John Craft and Elizabeth his wife, Edward Holcombe and Ann his wife, and Jacob Craft, or to their respective heirs, executors, administrators, or assigns, according to their several and respective legal shares and proportions thereof, being part of the consideration-money above mentioned."

On the twenty-fourth of the second month (February), 1820, John Craft, one of the heirs and legal representatives of the said Jacob Craft, deceased, by an instrument of writing of that date, assigned, transferred, and set over, all his title and interest of, in, and to the dower of Alice Craft, widow of Jacob Craft, and all claim to the right of said dower, to Mary Johnson, her heirs and assigns, to secure the payment of a certain promissory note for one hundred and fifty dollars, given by him to her, dated the first of April, 1818. This instrument contained a proviso, that if the said John Craft should pay the

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note with the interest due thereon, before the death of the widow, Alice Craft, the assignment was to be null and void. Of this assignment William Webster had notice.

On the twenty-eighth of February, 1820, the said John Craft, by indenture of that date, duly recorded on the same day, for the consideration of one hundred dollars, granted, bargained, and sold to William Powell, the real plaintiff in this cause, his heirs and assigns, "all the right, title, interest, claim, and demand, of, in, and to that certain messuage and tract of land, with the appurtenances, situate in the township of Abington, containing about twenty-nine acres, which he the said John Craft may have after the decease of Alice Craft, mother of the said John Craft: to have and to hold the said messuage and tract of land, and all and singular, &c., unto the said William [244] Powell, his heirs and assigns, to the only proper use and behoof of the said William Powell, his heirs and assigns forever," with general warranty.

William Webster, the defendant, had notice of this deed to Powell. The assignment from John Craft to Mary Johnson, was not recorded, and neither Mary Johnson nor William Powell had any notice of the conveyance to each other respectively, at the time of the execution of those instruments respectively, other than the recording of the conveyance to Powell.

Alice Craft, the mother of John Craft, died before the commencement of this suit, and the note of John Craft to Mary Johnson remained unpaid. The action was brought to recover the share of John Craft, in the sum of six hundred and forty-four dollars and seventeen cents, above mentioned, with interest from the time of the decease of Alice Craft.

It was agreed, that if, upon the case thus stated, William Powell was entitled to the fund in the hands of the defendant, in preference to Mary Johnson, a verdict and judgment should be entered in favour of the plaintiff; if otherwise, for the defendant.

The jury found a verdict for the defendant, under the following opinion, which was delivered by

Fox, President.—As I shall decide this case, there is but one question necessary for me to determine, which is, was it necessary that the assignment from John Craft to Mary Johnson, dated the twenty-fourth day of February, 1820, should have been recorded in the office for recording of deeds and mortgages in Montgomery county, in order to make it effectual against the subsequent deed of assignment to William Powell, dated the twenty-eighth of February, 1820? It was not necessary so to record it, and the jury will find a verdict under the agreement of the parties, for the defendant.

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The error assigned in this court, was in the opinion of the Court of Common Pleas.

Rawle, Jr., for the plaintiff in error.—The opinion of the court below, though apparently a decision upon only one of the instruments therein referred to, was in effect a decision on both, and presents two questions. First, Did the deed to Powell transfer the same thing that the assignment to Mary Johnson purported to transfer to her? Second, Was the assignment to Mary Johnson such an instrument as the law requires to be recorded?

The deed to Webster granted the premises conveyed to him expressly subject to the payment of the interest on the sum of six hundred and forty-four dollars and seventeen cents, to Alice Craft during her life, and after her death, to the payment of a proportion of it to John Craft, the nominal plaintiff. There was no personal covenant by the grantee for the payment of the principal or interest, but the land alone was charged with both. The assignment from John Craft to Mary Johnson, transferred all his interest in this sum *to which he should be entitled at the death of Alice Craft; but this assignment [*245] was never recorded, and must therefore be postponed to that to William Powell, which transferred the same thing and was duly recorded. Though the latter deed purports to be a conveyance of the land itself, it is in effect, a transfer only of the money charged upon the land. Powell paid for something, and Craft intended to pass something, and the only thing he could pass by the description contained in the deed, was his share of the money. This gave him an interest in the land itself, for it was charged upon it, and payable out of it alone. He had no other interest in the land, and consequently must have intended to pass it. This is clearly shown by his describing it as his interest in the land after the decease of Alice Craft. The court will give to the deed such a construction as will effectuate the intention of the grantor, *ut res magis valeat quam pereat*, and unless it be so construed as to pass his interest in the money charged upon the land, the deed becomes nugatory. The case of *M^r Williams v. Martin*, 12 Serg. & Rawle, 269, is a prominent example of the anxiety of the court to give effect to a deed according to the intention of the parties, where that intention is ambiguously and inaccurately expressed. If a mortgagee were to grant all his right, title, &c., in the mortgaged premises it would operate as an assignment of the mortgage debt; and the cases are analogous.

If the deed to Powell was an assignment of John Craft's proportion of the money charged upon the land, it was entitled to a preference over the unrecorded assignment to Mary Johnson.

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The first section of the act of 18th of March, 1775, *Purd. Dig.* 198, is very comprehensive, requiring "all deeds and conveyances of, or concerning any lands, tenements, or hereditaments in this province, or whereby the same may be in any way affected in law or equity" to be recorded within six months after their execution in the manner therein directed, and declares, that every such deed or conveyance which shall not be so recorded, "shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such deed or conveyance be recorded as aforesaid, before the proving and recording of the deed or conveyance, under which such subsequent purchaser or mortgagees shall claim." Does the instrument in question concern land or affect it in law or equity? It scarcely requires an argument to prove so obvious a truth. What was the interest to be affected? Alice Craft was entitled to dower in the land of her husband, which, after her death, was to go to his heirs. The land is sold, and the parties agree that the estimated value of the dower shall remain a charge upon the land in the hands of the purchaser. The claim of the heirs had nothing of a personal character about it: it was bound up in the land itself, which alone could be resorted to. The land thus charged, would pass into the hands of every successive grantee, against whom, however, no personal claim could be asserted. For the satisfaction of this claim, the land might be sold, or it might be recovered in ejectment; consequently *every assignment of such an interest, was a conveyance which affected the land, since it transferred from the assignor to the assignee, the right of selling, or obtaining possession of the land itself. It is at least as deep and abiding an interest, as a mortgage, every assignment of which must be recorded. The case comes within both the spirit and the words of the act of 1775, the object of which, as declared in the preamble, was to prevent secret conveyances and fraudulent incumbrances, and of course to prevent the secret and fraudulent transfer of incumbrances.

There is in principle no difference between a mortgage, and the incumbrance in question. The latter is fixed upon the land, and cannot be known to exist, unless actual notice be given, or it be recorded. If it be not recorded, a man may assign it, and receive the value of it, as often as he pleases. Here a palpable fraud was practiced on Powell, and may be practiced on others. He had no notice of the assignment to Mary Johnson, and without notice he ought not to be affected.

Potts, for the defendant in error.—The assignment to Mary Johnson, does not fall within the provisions of any of the re-

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ording acts in force in Pennsylvania. The act of twenty-eighth of May, 1715, sec. 2, 3, *Purd. Dig.* 195, authorizes all deeds of bargain and sale, for the conveyance of lands, tenements, and hereditaments, after having been acknowledged or proved in the manner therein prescribed, to be recorded. The eighth section of the same act, declares, that no deed or mortgage, or defeasable deed, in the nature of mortgages, "shall be good or sufficient, to convey or pass any freehold or inheritance" in lands, unless acknowledged, or proved and recorded within six months from the date thereof. The act of the eighteenth of March, 1775, is somewhat broader in its terms, but this act also relates exclusively to the conveyance of lands by deed, as is apparent from the first section, which requires all deeds and conveyances, (which are convertible terms,) of, or concerning lands, tenements, and hereditaments to be recorded in the county in which such lands, or hereditaments lie. The plain meaning of the act is, that conveyances of land, which in England would require to be accompanied by livery of seisin, shall be recorded in Pennsylvania. The assignment to Mary Johnson was not a deed, nor did it purport to pass a freehold, or inheritance in any lands, tenements, or hereditaments. It was merely a transfer of a debt charged upon land, but gave no interest in the land itself. If it had been recorded, it would have acquired no additional validity, for the defective recording of a deed, which the law requires to be recorded, or the recording of a deed which the law does not require to be recorded, is a nullity, and does not operate as constructive notice. It is a mistake to suppose that there was no personal liability on the part of Webster. The grantors, in their deed to him, passed all their interest in the land, and reserved nothing but the consideration-money; consequently, if the land had been sold for a *sum not sufficient to pay the whole amount of the [*247] charge, he would have been personally liable for the balance. The charge resembled a judgment, with which the recording acts have nothing to do. It created no interest in the land which could be levied upon. *Morrow v. Brenzier*, 2 *Rawle*, 188. But conceding it to be analogous to a mortgage, it does not follow, that every assignment of it must be recorded. There is no law which requires an assignment of a mortgage to be recorded; and it is not usual to record such an assignment. As to actual notice of the assignment to Mary Johnson, Powell might have had it if he had used reasonable diligence. An inquiry of Webster, who had notice of it, would have put him in possession of the fact. Whatever puts a party on inquiry, amounts to notice. *Lodge v. Simonton*, 2 *Penn. Rep.* 439.

But it is a sufficient answer to the claim of Powell, that his

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deed and the assignment to Mary Johnson, purported to pass different things. His was for the land itself; hers for a debt charged upon the land. No question, therefore, under the recording acts, arises in the case.

Kittera on the same side was relieved by the court.

The opinion of the court was delivered by

KENNEDY, J.—This case was removed by writ of error from the Court of Common Pleas of Montgomery county. It is an action of covenant-commenced there by the plaintiff in error to recover from the defendant in error the one-fifth of six hundred and forty-four dollars and seventeen cents, with interest from the time of the death of a certain Alice Craft.

On the trial of the cause in the court below, it appeared that John Craft, the nominal plaintiff, in conjunction with his wife and his brothers, Jonathan Craft and his wife, George Craft, Jacob Craft, and his brother-in-law, Edward Holcombe, with his wife Ann, a sister of the said John, Jonathan, George, and Jacob, all children and heirs-at-law of Jacob Craft, deceased, by their deed of indenture, bearing date the 1st day of April, 1817, in consideration of one thousand nine hundred and sixty-eight dollars and thirty-five cents, to them paid by William Webster, the defendant, at, and before the ensembling and delivery of the said indenture, and in consideration of the further sum of six hundred and forty-four dollars and seventeen cents, to be paid to them, their heirs, executors, administrators, or assigns by the said William Webster, his heirs, executors, administrators, or assigns, according to their several and respective legal shares and proportions therein, at, and immediately after the decease of the said Alice Craft, (widow of the said Jacob Craft, deceased,) and also for, and in consideration of the further sum of two thousand four hundred and twelve dollars and forty-eight cents, to be paid to the heirs of John Craft, deceased, (therein previously mentioned,) and to the heirs of the said Jacob Craft, deceased, their heirs, executors, administrators, or assigns, by the said William Webster, his heirs, executors, administrators, or [*248] *assigns, according to their several and respective legal shares and proportions therein, at and immediately after the decease of Esther Craft, (therein previously mentioned,) widow of the said John Craft, deceased, did grant, bargain, sell, release, and confirm, unto the said William Webster, his heirs and assigns, two messuages, and five lots, or pieces of land, therein particularly described, containing twenty-two acres and eighty-five perches, more or less, to have, and to hold the same with the appurtenances, unto the said William Webster, his heirs and

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assigns, to, and for the only proper use and benefit of him and them forever, under and subject, *inter alia*, to the payment of the said sum of six hundred and forty-four dollars and seventeen cents, out of the same, at, and immediately after the death of the said Alice Craft, unto the said John, the plaintiff, Jonathan Craft, George Craft, Jacob Craft, and Edward Holcombe and his wife, or to their respective heirs, executors, administrators, or assigns, according to their several and respective legal shares and proportions thereof, being part of the consideration-money before mentioned. Alice Craft, the widow of Jacob Craft, deceased, had a right of dower in the property conveyed to William Webster, and he was to retain the six hundred and forty-four dollars and seventeen cents, in his hands, until her death, and to pay to her six per cent. interest upon it annually, during her life, in satisfaction and in lieu of her dower.

On the twenty-fourth of March, 1820, John Craft, the nominal plaintiff, by his deed to secure to one Mary Johnson a debt of one hundred and fifty dollars with some interest due upon it, assigned to her all his right and claim to this six hundred and forty-four dollars and seventeen cents; and four days afterwards, on the twenty-eighth of the same month, by his deed of indenture acknowledged in due form, and recorded on the same day, in consideration of one hundred dollars therein mentioned, and acknowledged to have been received by him of William Powell, for whose use this action was brought, granted, bargained, and sold, to the said William Powell, his heirs and assigns, all his right, title, interest, claim, and demand, of, and in that certain messuage and tract of land, with the appurtenances, situate, &c., containing twenty-nine acres, be the same more or less, (which he might have after the death of Alice Craft, his mother, (meaning the same land conveyed as above mentioned to the defendant,) to have and to hold the said messuage and tract of land, with the appurtenances, unto the said William Powell, his heirs and assigns forever; to which there is added a covenant of general warranty on the part of John Craft, the grantor, for the title to the said messuage and tract of land, with the appurtenances.

Alice Craft, upon whose death the six hundred and forty-four dollars and seventeen cents were to be paid by the defendant, died before the commencement of this action.

The instrument or deed by which John Craft assigned his right in the six hundred and forty-four dollars and seventeen cents to Mary Johnson, was never recorded, but notice was given of the assignment *of it immediately to the defendant, [*249] who had notice likewise given him of the deed from Craft to Powell.

Upon this state of facts appearing on the trial, the de-

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defendant alleged that he was bound to pay the money demanded to Mary Johnson, and that William Powell, the real plaintiff in this action, had no right to demand, receive, or prosecute this suit for it. The plaintiff however contended, that as Mary Johnson had never put her assignment upon record, and that he, William Powell, being an innocent and *bona fide* purchaser of the claim without notice of the assignment to Mary Johnson, it, as against him, was therefore void, and he entitled to receive the money; and prayed the court to direct the jury accordingly; but the court told the jury, that it was not necessary that Mary Johnson's assignment should have been recorded in order to make it good against the plaintiff William Powell's claim, and the jury found a verdict in favour of the defendant. It is the charge of the court below in this particular that is complained of, and has been assigned for error.

It is argued by the counsel for the plaintiff in error, that the assignment of the claim in dispute by John Craft to Mary Johnson, is embraced within the terms of the act of the 18th of March, 1775, entitled, "A supplement to the act, entitled, 'An act for acknowledging and recording of deeds,'" the first section of which declares, that "all deeds and conveyances which from and after the publication hereof, shall be made and executed within this province, of or concerning any lands, tenements, or hereditaments in this province, or whereby the same may be in any way affected in law or equity, shall be acknowledged, &c., and shall be recorded in the office for recording of deeds, in the county where such lands or hereditaments are lying and being, within six months after the execution of such deeds and conveyances; and every such deed and conveyance that shall at any time after the publication hereof be made and executed, and which shall not be proved and recorded as aforesaid, shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration," &c. The counsel for the plaintiff contends, that this assignment is "of or concerning lands," and that land is "affected" by it, and that it therefore comes expressly within the provisions of the act; that the claim itself is in every respect like a mortgage, and ought to be considered as if it were such; and that the assignments of mortgages upon lands lying within this state, have ever been thought to fall within the provisions of the recording act, and have been in the city and county of Philadelphia almost universally recorded under it.

The practice may be as stated, and I do not feel inclined to condemn it, but still I cannot give my assent to the proposition that the assignment of a mortgage is embraced within the terms of the recording act, or that it is necessary under that act to have

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it proved and recorded, in order to preserve its validity against a subsequent assignment without notice, for a valuable consideration.

*A mortgage in England is only a personal contract, and the mortgagee has no interest beyond his money. [*250] Pre. in Ch. 99; *Wilmot on Mort.* 4. The mortgagor has the actual estate in equity, which may be devised, granted, and entailed; the entails may be barred by fine and common recovery. Co. Lit. 205, n. 1; *Moss v. Gallimore*, Douglass, 279. The land is held as a pledge or security for the payment of the money, and the mortgage though in fee (the legal estate in which it descends to the heir at law of the mortgagee) is considered as personal estate in equity. *Ib.* The mortgagor while in possession is deemed the owner of the estate. He gains a settlement by forty days' residence on it, because the mortgagee, notwithstanding the form, has but a chattel, the mortgage being only a pledge for the payment of his money. The legal title is in the mortgagee merely for a special purpose, and no further than to make it answer the end of a security for his money. *King v. St. Michaels*, Doug. 632; *Wilmot on Mort.* 17.

Upon the same principle, of the mortgagor being considered the owner of the estate, it has been held, that if he devise it and afterwards pay off the mortgage-money, and the mortgagee convey the estate to a trustee in trust for the mortgagor, it does not amount to a revocation of the will. *Doe v. Pott et al.*, Doug. 710. And even after the mortgagee has taken possession of the land without a foreclosure, he is still deemed in equity as having but a chattel, and the mortgage only a security. He can exercise no act of ownership over the property, which may incumber the mortgagor, such as making a lease of it for years to an under tenant. *Hungerford v. Clay*, 9 Mod. 1; 2 *Equi. Ca. Abr.* 610. And in equity he will be restrained from committing waste, although a mortgagee in fee. *Hanson v. Derby*, 2 Vern. 392; *Withrington v. Banks et al.*, Ca. Ch. 30. If the mortgage be of a leasehold estate, and the mortgagee procure a grant of a new term, after the old had expired, this will be a trust for the mortgagor. *Lee v. Lord Vernon*, 7 Pro. P. Ca. 432.

It is true, that if the mortgage-money be not paid at the day appointed for that purpose, the estate granted by the terms of the mortgage, is said in law to become absolutely vested in the mortgagee, and if it be for a term of years, upon his death would vest in his executors or go to his administrators, and if a fee, would descend to his heirs at law: That the payment of the mortgage-money or tender of it afterwards with interest, would

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not be sufficient to reinvest the mortgagor with the legal title to the mortgaged premises; but that a re-conveyance from the mortgagee, his executors or administrators, if the estate be for a term of years, or his heir at law, if a fee, is indispensably necessary to effect this: That formerly this reinvestiture of title, could only be compelled by application to a court of equity, but now the courts of common law by the stat. of 7 Geo. 2, c. 20; in cases of suits brought on mortgage bonds, or for the recovery of the possession of mortgaged lands, are authorized to [*251] constrain the mortgagees *to accept the principal and interest due on the bond on mortgage with costs, to stay them from proceeding to judgment therein, and to compel them to reconvey the mortgaged lands. It would also seem to be, that if a mortgage in fee has become forfeited, and the mortgagee has taken possession of the land, he may dispose of it by will as real estate. *Noy v. Mordaunt*, 2 Vern. 581; s. c. Pre. Ch. 265. But unless it should clearly appear to have been his intention to dispose of it as real estate, it will be considered personal. Or if he sell the land as a fee simple estate absolutely, and the vendee die, it, as between the executor and heir of the vendee, shall go to the heir. *Colt v. Iles*, 1 Vern. 271. But in all cases where the mortgagee in fee is not in possession, and the equity of redemption not foreclosed or released, his estate is considered personal. *Fisk v. Fisk*, Pre. Ch. 11; s. c. 2 Eq. Ca. Abr. 429, pl. 4; *Audly v. Audly*, 2 Vern. 192; *Howel v. Price*, 1 P. Wms. 291; *Attorney-General v. Vigor*, 8 Ves. 256. A devise "of all my lands" will not pass the interest of the mortgagee in fee, in the land so mortgaged to him. *Winn v. Littleton*, 1 Vern. 3. Nor will a devise "of all my lands, tenements and hereditaments," be sufficient, where the mortgage was forfeited at the time of making the will, and the equity of redemption foreclosed or released afterwards. *Strode v. Russell*, 2 Vern. 621.

I may observe here, that although a mortgagee in fee, may by his will dispose of his interest in the mortgaged lands as real estate, yet that does not prove its character to be real estate, nor that it is not purely personal, because a testator may direct his executors to invest money due to him upon bond or otherwise, in the purchase of land, to be conveyed to A. B. in fee, and if after the death of the testator, and before the purchase is made by the executors, A. B. dies also, the money so directed to be laid out for the use of A. B. cannot be claimed by his executors or administrators, but will belong to his heirs at law, the same as if it were real estate. *Edwards v. Warwick*, 2 P. Wms. 171; *Beauclerk v. Mead*, 2 Atk. 170. So the testator may impress the character of personalty upon his real estate by his

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will, as if he devises it to his executors, to be sold by them, and directs the money arising from the sale thereof to be distributed among several persons, naming them, or to be added to his personal estate, and considered as part of it. *Lord Bristol v. Hungerford*, Pre. Ch. 81; *Craig v. Leslie*, 3 Wheat. 563. In all cases, however, where the mortgagee in fee dies without making any disposition of the mortgage by will or otherwise, if the mortgagor wish to redeem, he must pay the mortgage-money and interest to the personal representatives of the mortgagee, and not to his heir at law, although he may be in actual possession of the land. 1 *Equi. Ca. Abr.* 326-7, pl. 2, 3, 4, 5.

Although upon the mortgagee in fee's dying in the actual possession of the mortgaged premises, his heir at law, in England, will succeed to the possession of them; or in case of the mortgagor's being in the possession, the heir of the mortgagee, if the mortgage be forfeited, may recover the possession from the mortgagor by ejectment unless *he will pay the mortgage-money, yet the land in his hands is but a pledge which [*252] he holds in trust for the executors, until the money shall be paid, when he is bound to reconvey it to the mortgagor. 1 *Eq. Ca. Abr.* 326-7, pl. In *Martin v. Mowlin*, 2 Burr. 978-9, Lord Mansfield, in speaking of a mortgage, which was the subject under consideration in that case, gives a summary of the law as it was then understood in England in regard to a mortgage, where he says, it "is a charge upon the land; and whatever would give the money, will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; it will pass by a will not made and executed with the solemnities required by the statute of frauds. The assignment of the debt, or forgiving it, will draw the land after it as a consequence; nay, it would do it, though the debt were forgiven only by parol, for the right to the land would follow, notwithstanding the statute of frauds." Mr. Judge Throbridge has, in his reading on the law of mortgage, taken exception to some of Lord Mansfield's positions, laid down in this passage just quoted. See 8 *Mass. Rep.* 553, Appendix. But it may be observed, that the doctrines of Littleton and Coke on the subject of mortgages, ought not to be adopted as the test by which the improvements of Lord Mansfield's day in the law on that branch of it, are to be either approved or condemned. 4 *Kent's Comm.* 187-8.

Judging of the nature, character, and effect of a mortgage from the authorities referred to, and supposing it to be in all respects the same in this state that it is in England, it appears

[*Craft for the use of Powell v. Webster.*]

to me that the assignment of it would not come within that part of the recording act which has been recited.

But if there remained a doubt on this point, a due consideration of our acts of assembly in respect to mortgages, will be sufficient, I think, to remove it. The provisions which have been thereby made for taking mortgaged lands in execution, and selling them by the sheriff or coroner, for such estates as are mentioned in the mortgages respectively, where default has been made in paying the debts intended to be secured by them, and again for having satisfaction entered upon the margin of their records where they have been paid, prove to my mind, that a mortgage is not to be considered as conveying any estate or interest whatever in the land from the mortgagor to the mortgagee; and that the owner of land in fee who has mortgaged it, whether for a term of years, or in fee, is still, notwithstanding, the legal owner of it, and must be so considered, until he shall have disposed of it, or it shall be taken in execution, and sold from him. The mortgage is merely a lien upon his land, as a security for the payment of the money or fulfilment of some engagement therein mentioned. The mortgagee has no subsisting interest in the land, which he can convey either absolutely, conditionally, or qualifiedly; or even mortgage to a third person. The mortgage is purely an incident to the debt, as completely so, as the bond is to the debt that it has been

[*253] *given to secure the payment of, and its existence cannot possibly be imagined without the debt. If the debt be paid at any time, either before, at, or after the day assigned for that purpose, or be released or extinguished, the mortgage thereby becomes a perfect nullity, the land discharged of the incumbrance; the mortgagor is as much the legal owner of it, as if the mortgage had never been made. A reconveyance from the mortgagee to the mortgagor in order to perfect his investment of title to the land, is not deemed requisite, because the mortgagee is not considered as ever having had any actual right to the land to make a reconveyance necessary. Such, I think, was the understanding of the legislature in 1715, when they passed the act for acknowledging and recording of deeds; and again, in 1823, when they passed an act relative to mortgages. By the 9th section of the first act, and the first and second sections of the latter, mortgagees are required upon being paid the amount of the mortgage-money, whenever that may be, to enter satisfaction upon the margins of the records of their respective mortgages; and in case of neglect or unwillingness to do so, a mode is provided for enforcing it. But a deed of reconveyance from the mortgagee to the mortgagor, such as is deemed requisite in England, to reinvest the mort-

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gagor with his title to the land, is not mentioned in these acts ; had it, however, been considered in the slightest degree necessary, we must suppose that it would have been noticed and provided for by the legislature when they were engaged in legislating specially for the security of a mortgagor, against a satisfied mortgage. They no doubt thought, and very correctly too, that the act of 1705, which I shall notice presently, had prescribed and limited the effect of mortgages in such a way as to make a provision for a reconveyance nugatory, as nothing was ever vested in the mortgagee by virtue of the mortgage for it to operate on. The only thing which might seem to contradict the idea that no interest in the land passes from the mortgagor to the mortgagee, by the execution of the mortgage, is contained in the eighth section of the act of 1715, which declares, that "no deed or mortgage, or defeasible deed in the nature of mortgages, hereafter to be made, shall be good or sufficient to convey or pass any freehold or inheritance, or to grant any estate therein for life or years, unless such deed be acknowledged or proved, and recorded," &c. I however, do not think that this section of that act is to be understood as necessarily implying that every valid mortgage must pass or convey in the land the estate therein expressed from the mortgagor to the mortgagee. It may be construed as declaring, that unless the mortgage be proved, acknowledged, and recorded, &c., it shall not be sufficient under the provisions of the act of 1705, which prescribes a judicial course of proceeding, whereby the land mortgaged, when default has been made by the mortgagor, in paying the money for the space of twelve months after it has become payable, may be taken in execution and sold ; and by the sixth section of this act, it is enacted, that "when the said lands and hereditaments shall be so sold or delivered as *aforesaid, the person or persons to whom they shall be so sold or delivered, shall and may hold and enjoy [*254] the same, with their appurtenances, for such estate or estates as there were sold and delivered, clearly discharged," &c., and by the eighth section, "that no sale or delivery which shall be made by virtue of this act, shall be extended to create any further term or estate to the vendees or mortgagees or creditors, than the lands or hereditaments so sold or delivered, shall appear to be mortgaged for, by the said respective mortgagees and defeasible deeds." The course of proceeding authorized by this act, is the only one by which the mortgagor can be divested of his right and title to the land mortgaged. It is the sale under it which creates the estate and passes it to the vendee ; or the delivery of the land under it to the mortgagee or creditor, which creates and passes the estate to him, and the mortgage limits

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merely the extent of the estate that is so passed or transferred in either case. This construction seems to me to comport best with the nature and effect of the proceeding that is directed by this act, as also with the whole spirit of the act itself.

The writ which the mortgagee, in case of a default on the part of the mortgagor to pay the money, is thereby authorized to sue out, is a *seire facias*, requiring the officer to whom it shall be directed, "to make known to the mortgagor, his heirs, executors, or administrators, that he or they be and appear before, &c., to show cause, if anything he or they have to say, wherefore the said mortgaged premises ought not to be seized and taken in execution for payment of the said mortgage-money, with interest," &c., and in case no sufficient cause be shown, judgment is directed to be rendered by the court, "that the plaintiff in the *seire facias* shall have execution by *levari facias* to the proper officer, by virtue whereof the said mortgaged premises shall be taken in execution, and exposed to sale in manner aforesaid, and upon sale conveyed (by the officer making the sale) to the buyer or buyers thereof, &c., but for want of buyers, to be delivered to the mortgagee or creditor, in manner and form, as herein above directed, concerning other lands and hereditaments to be sold, or delivered upon executions for other debts or damages." By the proceedings under this act, the mortgaged premises are to be sold—surely not as the property of the mortgagee, because nothing could be more incongruous than for a creditor to cause his own property to be sold, perhaps sacrificed, to pay the debt of his debtor; it must then be, as the property of the mortgagor who is the debtor, that they are to be sold. It is not the equity or right of redemption either, that is to be sold, but such estate as is described in the mortgage. If, however, a sale cannot be effected for want of buyers, then the mortgagee or creditor, may have so much of the mortgaged premises, as will be equal in value to the amount of his debt delivered to him, to hold for such estate as is described in the mortgage. By this operation, the estate is transferred to him, which militates against the idea of his [*255] *having been invested with the estate described in the mortgage by the execution of it.

The heir of the mortgagee in this state, has nothing to do with the mortgage, or the land upon which it was given; and whether it be in fee, or for a term of years, the claim under it is purely personal, and belongs to the executors or administrators, as part of the personal estate of the testator or intestate, to be administered and accounted for by them as legal assets. They alone have authority to demand and receive the money due upon the mortgage. They may release, or assign it, although it be in fee;

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and their assignee may maintain an action of ejectment in his own name to recover the possession of the land, as was decided by this court in *Simpson v. Ammons*, 1 Binn. 175.

A mortgage, in Pennsylvania, is literally and legally now understood to be but a bare security for the payment of the money, or performance of other acts therein mentioned; and at most only a chose in action; although assignable, I admit, so as to enable the assignee of it, to maintain and prosecute in his own name a writ of *scire facias* upon it, under the provisions of the act of assembly of 1795, already noticed, authorizing the mortgaged premises to be taken in execution, and sold for the purpose of making payment of the debt. For its being barely a security, I refer to the cases of the *Schuylkill Co. v. Thoburn*, 7 Serg. & Rawle, 419; *Simpson v. Ammons*, 1 Binn. 175; *Wentz v. Dehaven*, 1 Serg. & Rawle, 317; *M'Call v. Lenox*, 9 Serg. & Rawle, 304; 4 Kent's Com. 153-4. If the mortgagee held a real interest under the mortgage in the land, either of an equitable or legal character, it would be the subject of execution according to the cases of *Humphreys v. Humphreys*, 1 Yeates, 427, and *Hurst v. Lithgrow*, 2 Yeates, 24, where it is laid down, that all possible titles, contingent or otherwise, in lands where there is a real interest, may be taken in execution. But it was ruled by this court in *Rickert v. Madeira*, 1 Rawle, 325, that the interest of the mortgagee, whether the mortgage was legal or equitable, could not be taken in execution. Mr. Justice Rogers, in delivering the opinion of the court in that case, says, "a mortgage must be considered either as a chose in action, or giving title to the land and vesting a real interest in the mortgagee. In the latter case it would be liable to execution; in the former, it would not, as it falls within the same reason as a judgment, bond, or simple contract." And then he proceeds to show, as well by reason as authority, that it is merely a chose in action and therefore not liable to be taken in execution.

This being the character of a mortgage in Pennsylvania, it is not necessary that the assignment of it should be in writing, to satisfy either the requirements of the statute against fraud and perjuries, *Richards v. Syms*, 3 Eq. Ca. Abr. 617, pl. 2, or those of the common law. Debts or choses in action may be assigned for a valuable consideration by parol. *Fashion v. Atwood*, 2 Ch. Ca. 372; Com. Dig. tit. Chan. 2 H. page 370, (Rose's Ed.); *Prescott v. Hall*, 17 Johns. *284; *Briggs v. Dorr*, 19 Johns. 95. The debt being everything, and the mort- [*256] gage barely a security for the payment of it, it follows of necessity, that whatever affects the debt, will produce a corresponding effect upon the mortgage. If the debt be extinguished by any means, the mortgage will thereby become so likewise. A parol

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forgiving of the debt accompanied by a delivery of the securities to the debtor or mortgagor, will be sufficient to extinguish the mortgage, *Richards v. Syms*, 2 Eq. Cas. Abr. 617, pl. 2; s. c. *Barnard*, 90; *Atk.* 319; *Con.* 225. So a transfer of the debt will likewise be a transfer of the mortgage. *M'Call v. Lenox*, 9 *Serg. & Rawle*, 304; 4 *Kent's Com.* 186, and the cases cited in the margin. In short, an assignment by the mortgagee of his interest in the land without an assignment of the debt, is considered to be without meaning or use. 4 *Kent's Com.* 186.

Against all this, it has sometimes been objected, that as the mortgagee may maintain an action of ejectment against the mortgagor and take the possession of it from him, he must necessarily have a right to it of some sort. This, however, may be tolerated on the ground of the land being considered in the nature of a pledge, and that as such he has a right to possess it, in order that it may be well taken care of, if for no other purpose, until he is paid his debt, but if he does take the possession, he will have to account to the mortgagor as to the owner of the land for the issues and profits. A right to the possession is all that is necessary for supporting the action of ejectment; and a right to the land is not at all requisite. A right to the possession of a security for the payment of money due, may exist in the creditor without either a general or special property in the thing retained, as against the debtor: such, for instance, is the lien of a factor upon the goods of his principal, which gives him a right of retaining the goods of his principal until his demands in that capacity are satisfied; yet it has been held, that as against his principal it gives him no general or special property. *Meany v. Head*, 1 *Mason*, 319.

I may here observe, also, that since the passage of the act of 1705 already recited and commented on in part, which has given the mortgagee a remedy that is not only final and perfect, but at the same time calculated to afford him every possible advantage that he could wish for in raising his money by a sale of the land and buying it himself if he chooses, the propriety of permitting him without such sale by ejectment to turn the mortgagor out, and to take possession of the land himself, has been denied. Chancellor Kent, in speaking of it, very truly and justly says, "it not being a final remedy is vexatious, and the possession under it terminates naturally in a litigious matter of account and a deterioration of the premises." 4 *Kent's Com.* 150, in note; and it appears to me, ought not to have been allowed here since the act of 1705 came into operation.

Having, as I believe, shown that the assignment of a mortgage is not a "conveyance of or concerning land, or whereby the

[Craft for the use of Powell v. Webster.] .

same may *be any way affected in law or equity," (which are the words of the recording act,) it is not necessary that it should be recorded as required by that act to give it validity against a subsequent assignment made by the mortgagor to a third person, for a valuable consideration, without notice of the first. If the first assignment were in writing, proved and recorded, the recording could afford the assignee therein named no additional protection whatever, against a claim under a subsequent assignment made to another person by the mortgagor, because the recording of such an assignment not being authorized, could neither tend to support nor invalidate it. [*257]

What I have said on the subject of mortgages, may perhaps not have been necessary for the decision of the case before us, but I was led into it by the ingenuity and great earnestness with which the counsel for the plaintiff in error endeavoured to assimilate the claim in controversy, to a claim for money secured by a mortgage upon land, as already mentioned.

The claim, however, arises out of a transaction different both in form and substance, as it appears to me, from a mortgage. The claim here is for part of the purchase-money of the land sold and conveyed by John Craft, the nominal plaintiff, in conjunction with others, as already stated.

By the terms of the deed of conveyance made to Webster, it is obvious that the parties intended to make that portion of the purchase-money which remained unpaid after the execution and delivery of the deed, a lien upon the land, and the money in dispute being a part of that portion, is of course a charge upon the land. Webster is doubtless bound personally also for the payment of it, although he gave no bond or note for that purpose. There is nothing in any part of the deed which tends in the least to show that it was the agreement or understanding of the parties that he was not to be personally responsible for the payment of the whole of the purchase-money. On the contrary, it is expressly mentioned that it is to be paid by Webster, his heirs, executors, or administrators. Beside, the vendors having by their deed of conveyance, which is absolute and not conditional, parted not only with the possession, but also with all their right, title, and interest in the land, in consideration of a certain sum of money, part of which was paid, and the residue to be paid them by the vendee, nothing short of an agreement made to appear in very intelligible form, to that effect, ought to exempt the vendee from personal liability. Indeed, it is not pretended by the defendant himself, or his counsel in this case, that he is not personally bound for the payment of the money, but has been so argued by the counsel for the plaintiff, as an

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auxiliary to his main proposition, that the plaintiff has an actual interest in the land, notwithstanding the conveyance made to the defendant. The defendant, it seems, is willing to pay the money as soon as it shall be determined which of the persons contending for it is entitled to receive it.

There are no words of either condition or reservation, as it [*258] appears *to me, in the deed made by John Craft and others to the defendant. They intended merely to make the unpaid part of the purchase-money a charge upon the land, and with this view the land is conveyed subject to the payment of it; but to effectuate this design, it was not necessary that the vendors should make the conveyance conditional. The unpaid purchase-money being made a lien upon the land by their agreement, the land could be made liable for it afterwards in the hands of a purchaser, in an action of debt, to be brought for that purpose by giving him notice, and making him a party to the proceeding, which generally answers a much better purpose for collecting money than the action of ejectment, and therefore ought to be preferred, even where the party may have his election to adopt and pursue either remedy.

John Craft, then, having conveyed all his right, title, and interest to and in the land to William Webster, had nothing in it that he could convey to William Powell. In his conveyance to Powell, his claim to the money in dispute is not even mentioned, and cannot be considered as assigned thereby.

It is said, however, that he had no other interest or claim that could be connected with the land in any way, and therefore the deed made by him to Powell ought to be so construed as to embrace it, according to the rule of *ut res magis valeat quam pereat*. In the construction of deeds, or instruments of writing containing the agreements of parties, some regard must surely be had to the established meaning of the words in which they are couched, but to give the construction asked for here, for the purpose of supporting Powell's claim, would be to overturn this principle of construction entirely, and to defeat the great end of committing such things to writing. What Chancellor Kent has laid down in respect to the assignment of mortgages, is perhaps more strikingly applicable to this case than in the case of assigning a mortgage, which is this, "the assignment of the interest of the mortgagee in the land, without an assignment of the debt, is considered to be without meaning or use." 4 Kent's Com. 186.

It could certainly never have entered into the mind of any one, upon reading the deed from Craft, to Powell, that the object of it was to transfer or to give a right to demand and receive the money sued for in this case. And had it been requisite to put

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the assignment of such a claim upon record, for the purpose of giving notice of it, this deed could have afforded none.

Mary Johnson, after obtaining her assignment, did all that either law or prudence required of her, in giving immediate notice of it to the defendant, who was to pay the money. She is not chargeable with leaving anything in the possession of John Craft, the assignor, that could enable him to practice a fraud upon others, by assigning this claim again to them. If Craft had held a note or bond for the payment of this money, and Mary Johnson, after obtaining an assignment upon a separate paper, or merely a verbal assignment, had left *the note or bond still in the possession of Craft, and he had [*259] afterwards assigned it to Powell for valuable consideration, without notice, a different question perhaps would have been presented. In the present case, if it was really the object of Powell in obtaining his deed of conveyance from Craft, to get an assignment of the claim sued for, he, as a prudent man, ought to have called upon the defendant before he concluded a contract with Craft for it; and if he had done so, doubtless as the defendant was advised of Mary Johnson's assignment, he would have told Powell of it, so that if Powell is likely to sustain a loss, it is chargeable in some degree to his own neglect and want of vigilance. Hence, if the deed by Craft to Powell had embraced the claim sued for here, Powell must be postponed to Johnson, according to the maxim, of *qui prior est tempore potior est jure*.

The judgment of the court below is therefore affirmed.

Judgment affirmed.

Cited by Counsel, 3 Wh. 463; 7 W. 266; 5 W. & S. 148; 9 W. & S. 79, 96; 1 Barr, 125; 5 Barr, 433; 10 Barr, 131; 1 J. 530; 1 H. 295, 625; 1 C. 198; 3 C. 217; 8 C. 396; 12 C. 468; 3 G. 283; 1 Wr. 454; 2 Wr. 234; 4 Wr. 144; 6 Wr. 343; 2 S. 300, 360; 4 S. 388; 6 S. 59; 12 S. 341; 14 S. 65, 298; 15 S. 97; 18 S. 321; 21 S. 222; 22 S. 459; 27 S. 151; 1 W. N. C. 23; 11 W. N. C. 71; 14 W. N. C. 296.

Cited by the Court, 6 Barr, 230; 3 H. 322; 6 H. 64; 13 Wr. 287; 15 N. 455.

Following the *dictum* in this case, that an assignment of a mortgage is not within the recording acts, it was held, in 9 Barr, 406, that an assignment of a mortgage need not be recorded. But in 6 H. 401, it was held that it *might* be recorded, and that a certified copy of the record was evidence. Act April 9, 1849, s. 14, provided that all assignments of mortgages may be recorded. This the court has construed to mean "shall be recorded," so that the matter is now at rest: 27 S. 377, s. c. 1 W. N. C. 439.

[PHILADELPHIA, FEBRUARY, 1833.]

Brown *alias* Potter *against* The Commonwealth.*

HABEAS CORPUS.

Where a person has been sentenced to imprisonment, for a term to commence immediately after the expiration of a preceding sentence, and the first sentence is reversed upon error, the term of the second begins to run from the time of the reversal of the first.

THE prisoner was convicted of larceny in the Quarter Sessions of *Bucks* county, and sentenced to five years' imprisonment, in the Eastern Penitentiary on the 13th of December, 1831. On the same day he was convicted of a breach of prison, and sentenced to one year's imprisonment, "to commence and take effect immediately after the expiration of the sentence passed on him for the larceny of the goods of Hiram Jones." The first sentence having been reversed on error, the prisoner was brought up on *habeas corpus*; and now *Grimshaw* moved to discharge him, because the second sentence had expired by its own limitation, the preceding one having been a nullity; contending also, that the second sentence was void, for want of a certain period of beginning; and for these positions, he cited, *Respublica v. De Longchamps*, 1 Dall. 116; *Russell v. The Commonwealth*, 7 Serg. & Rawle, 489; *The King v. Wilkes*, 4 Burr. 2575; *Chitty's Crim. L.* 586.

PER CURIAM.—The preceding sentence, though erroneous, was not void. On the contrary, it was in full force, till it was [*260] reversed, and *would protect the officer from an action of trespass for false imprisonment. Having been thus in force, it expired, for all legal purposes, at the time of its reversal, and the period of the subsequent one which was dependent on it, began to run. The confinement which the prisoner has undergone, therefore is referable to the prior sentence, and not to the succeeding one, which taking effect from the termination of the former is yet in force.

Prisoner remanded.

* This case was decided in February, 1833, but was accidentally omitted in its proper place.—REPORTER.

[PHILADELPHIA, MARCH 29, 1833.]

Pritchett and Another *against* Jones.

IN ERROR.

An agreement to sell a chattel in an unfinished state, to be delivered at a future time, is an executory contract, for a breach of which an action for damages lies; but it does not pass the property in the chattel.

Where, therefore, A. on the 31st of July, 1828, in consideration of a pre-existing debt, contracted to sell to B. a quantity of hides and skins, then in the vats of the vendor undergoing the process of tanning, but which were then capable of being removed, to be delivered on or before the 12th of the following November, some of them at fixed prices, and the rest at the market price, and to be passed to the credit of the vendor to settle his account, it was held, that no immediate property vested in the vendee, and that the leather was liable to execution as the property of the vendor, notwithstanding the transaction was open, and there was proof that it had long been the course of business for curriers in the city to purchase leather of tanners in the country, while in the process of manufacture, to be delivered when tanned, and that advances were frequently made on such purchases.

WRIT of error to the Court of Common Pleas of *Chester* county, in an amicable action of trespass, *vi et armis*, entered into between the plaintiffs in error, William and James Pritchett, who were also plaintiffs below, and Jonathan Jones, the defendant in error, late sheriff of *Chester* county, to recover damages for seizing and selling under execution, a quantity of leather in process of manufacture, as the property of Augustin Williamson, which the plaintiffs claimed as their property.

From the evidence given on the trial, it appeared, that the plaintiffs were curriers residing in the city of Philadelphia, and Augustin Williamson a tanner, residing in *Chester* county. There had been dealings between them for some time, and in July, 1828, Williamson was indebted to the plaintiffs in the sum of one thousand and ninety-eight dollars and ninety-eight cents. They called on him at his tanyard for payment, and being unable to pay the debt in cash, it was proposed by the plaintiffs to take leather in satisfaction of it, and he agreed to let them have it. They proposed to get wagons, and haul it away immediately, but Williamson objected, as wagons could not be procured at that season of the year. It was then proposed by *the plaintiffs, to send up hands to tan out the leather, which [*261] was then unfinished in the vats, but this Williamson also objected to, as he was unable to accommodate the hands.

An agreement was then entered into in the following terms, viz.:

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“WAGGONTOWN, *July 31, 1828.*

“I have this day sold William and James Pritchett the following described leather, now in my tanyard; nineteen and a half hides of harness, and nineteen and a half hides of Spanish sole, has been handed over to them, which they have marked and returned to me to be tanned, which is to be a sample of the balance :

“Ninety-five and a half hides harness, to be delivered in the rough, at twenty cents per pound.

“One hundred and six hides Spanish sole, at twenty cents.

“Seven dozen calf skins, at market price.

“Five chaise hides, four dollars and fifty cents.

“All to be delivered in Philadelphia, on or before November 12th, 1828, and to be passed to my credit to settle my account.

(Signed) AUGUSTIN WILLIAMSON.

“Received one dollar on account.

(Signed) AUGUSTIN WILLIAMSON.”

This agreement did not comprise the whole stock of Williamson, who had other leather in his yard, unfinished, besides some which was tanned out. This was an open, not a secret transaction. It took place in the presence of the journeymen and Williamson, who was examined as a witness on the trial, though he communicated it to his sister Phœbe (one of the execution creditors) who kept house for him at the time. Both Pritchett and Williamson spoke of it publicly and repeatedly to different neighbors soon after it took place, and another execution creditor heard of it by letter from Philadelphia.

On the twenty-third of August, following the agreement, Williamson gave a bond accompanied by a warrant of attorney, to Samuel Hatfield, conditioned for the payment of one hundred and fifty-three dollars, for a debt, the whole of which, except ten dollars or less, was contracted prior to the sale to the Pritchetts. On the day of the date of the bond, judgment was entered upon it, and execution issued on the first of the following September.

On the twenty-second of August, 1828, he gave a similar bond to his sister Phœbe Williamson, to secure the payment of four hundred and twenty-five dollars, of which, the sum of two hundred and eighty dollars and ninety-four cents, was for money advanced long prior to the sale to the Pritchetts, and one hundred and forty-five dollars were added to cover debts he owed to other people, contracted also prior to the sale, and which his sister afterwards paid off. Judgment was entered on this bond the fifteenth of September, 1828, and execution issued on the same day.

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On the eleventh of September, 1828, he gave a similar bond to David Read and John Pearce, for three hundred and seventy-four *dollars and thirty-five cents. This debt was also [*262] contracted prior to the sale to the Pritchetts. The judgment was entered on the twelfth of September, 1828, and on the same day execution issued.

Under these several executions, the defendant, on the fifteenth of September, 1828, levied on the property in question, while in the vats in Williamson's tanyard, and before the process of manufacture was completed, together with other property, personal and real.

The defendant was notified that the property belonged to the plaintiffs, and had been purchased by them while in the process of manufacture in Williamson's yard, and he was forbidden to sell it. He was indemnified, however, and proceeded with the sale. Under these executions he justified his proceedings.

The judgment in favour of Phœbe Williamson, was proved by her brother Thomas Williamson, to have been procured by him in West Chester, without her knowledge, consent, or participation. She resided in the house with her brother Augustin at the time of the sale to the Pritchetts, passed through the room while they were writing the bill of sale, and knew of its existence, but it did not appear that she at any time objected to it.

It was proved by numerous witnesses at the trial, that it had long been the course of business for curriers in the city to purchase leather of tanners in the country, while in process of manufacture, to be delivered when tanned, and that advances were frequently made on such purchases.

The plaintiffs' counsel requested the court to charge the jury as follows, viz.:

1. There is no legal objection to an absolute sale of leather, undergoing a process of manufacture, to be delivered when finished.

2. The possession of the leather as left in this case, after the sale, was consistent with the stipulations of the bill of sale, and not fraudulent, because it was an article undergoing a process of manufacture, to be delivered when finished.

3. The possession as left in this case, was conducive to a fair object the parties had in view, which had been shown to, and is approved of by the court, to wit: the completion of the manufacture.

4. It was not necessary here that there should have been an actual removal of the wet hides, and the sale was attended with every formality which the law requires in such a case.

5. The consideration expressed on the face of the instrument, that the leather should go to discharge a precedent debt, was

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good and sufficient in law, and the written instrument is not to be explained or contradicted by parol testimony, unless it goes to show actual fraud in procuring it, or mistake in the execution of it.

6. The court is requested to say, whether there has been any evidence given in this case, of either fraud or mistake, such as will authorize the jury to look beyond the instrument itself for the consideration.

[*263] *7. Although the object of the purchasers may have been to secure a precedent debt, still, if the transaction was according to the usual course of business between curriers in the city and tanners in the country, the possession was not therefore fraudulent.

8. The bond from Augustin Williamson to his sister Phœbe, was taken without her request, direction, or participation at the time, and if the jury believe from the evidence, that prior to her knowledge of this transaction, she knew of and had assented to the sale to Messrs. Pritchetts, she is bound by it.

The court reviewed the facts of the case, explained the law arising upon them to the jury, and answered the propositions submitted to them. It is unnecessary to insert the charge at length. Its result was stated by the court in conclusion as follows:

“Upon the whole case, the opinion of the court therefore is, that this contract of sale entered into the 31st of July, 1828, not being accompanied or followed by a change of possession, is to be pronounced by the policy of the law fraudulent and void as respects subsequent execution creditors; although it may be perfectly fair and upright between the parties to it: but because the possession was permitted to remain in the hands of Williamson, the former owner and alleged vendor, without any change in manner or appearance to the world, and to the other creditors, after or before the sale—the goods were not protected from the executions of the other creditors, the sheriff is justified, and the verdict should be for the defendant.”

The jury, nevertheless, gave a verdict for the plaintiffs for one thousand and sixty dollars, which the court set aside. On the second trial, by agreement in writing, the evidence given on the former trial was read by the President Judge to the jury, the same points were made, and the same charge delivered, the cause being submitted without argument, and a verdict was taken for the defendant.

The plaintiffs' counsel excepted to the charge, and requested the court to file it of record, which was accordingly done.

Dillingham and Chauncey for the plaintiffs in error.—It de-
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serves to be remarked, that no one of the debts for which execution issued against the property in question in this case, was contracted by means of a false credit, nor was the bill of sale to the plaintiffs in error given to defeat any suit, judgment, or execution, or in any other way to delay, hinder, or defraud creditors. It was a sale of part only of the debtor's stock, openly made, accompanied by a bill of particulars, and attended with symbolical delivery of possession. It comes within an exception to the broad rule as to possession, which is as well established as the rule itself. The object, scope, and meaning of the stat. of 13 Eliz. c. 5, is to prevent conveyances intended to delay, hinder, and defraud creditors. Rol. Dig. 295. In Twynes' Case, 3 Co. Rep. 80, which is the leading one on this subject, the bill of sale was given *after [*264] the suit had been commenced by another creditor, expressly for the purpose of defeating him. No one of the six reasons given in support of the decision of that case, applies to this. There, the conveyance was of the donor's whole property; the donor continued in possession, and by reason thereof traded with others, and deceived and defrauded them; it was a secret transaction; it was made after suit had been brought by another creditor; a trust existed between the parties, and it contained an unusual clause, setting forth the honesty of the transaction. In the case now under consideration, a good and sufficient reason for permitting the possession to remain in the vendor, is expressed in the instrument and shown to exist, to rebut the presumption of legal fraud. The cases of the strictest class are all satisfied by this exception, and we have authorities in our favour from *Bucknall v. Royster*, Prec. in Ch. 285, in 1709, to *Clow v. Woods*, 5 Serg. & Rawle, 275, in 1819. The cases on this subject were all ably reviewed in *Clow v. Woods*, and in *Sturtevant v. Ballard*, 9 John. 337; and more recently by Chancellor Kent, in his Commentaries; 2 Kent's Com. 515, 524; and there is no authority to be found in which the exception is not distinctly recognised, that where a good and sufficient reason for postponing the delivery of possession, is expressed in the instrument and shown to the court, a presumption of fraud does not arise, and the conveyance is good. *Stone v. Grubham*, Buls. 225; *Meggot v. Mills*, 1 Ld. Ray. 286; *Cole v. Davies*, Ib. 724; *Ryall v. Rolle*, 1 Atk. 165; *Cadogan v. Kennet*, Cowp. 432; *Edwards v. Harben*, 2 T. R. 587; *Stuart v. Lombe*, 5 Eng. Com. L. Rep. 167; Bull. N. P. 258; *Hamilton v. Russell*, 1 Cranch, 309; *United States v. Hooe*, 3 Cranch, 88; *Whipple v. Foot*, 2 John. R. 418; *Barrow v. Paxton*, 5 John. R. 261; *Vredenbergh v. White*, 1 John. Cas. 156; *Allen v. Smith*, 10 Mass. R. 308; *Jewitt v. Wonnor*, 12

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Mass. R. 300 ; *Water v. M'Clellan*, 4 Dall. 208 ; *Wilt v. Franklin*, 1 Binn. 502 ; *Dawes v. Cope*, 4 Binn. 265 ; *Martin v. Mathiot*, 14 Serg. & Rawle, 214 ; *Babb v. Clemson*, 10 Serg. & Rawle, 428 ; *Welsh v. Bekey*, 1 Penn. R. 57 ; *Herron v. Fry*, 2 Penn. R. 263 ; *Snowden v. Warder*, 3 Rawle, 101.

Bell and J. Sergeant, for the defendant in error.—The general rule undoubtedly is, that a sale of chattels, unaccompanied by possession, is a fraud *per se*, and void against creditors, and mainly for this reason, that possession of chattels is the only or chief evidence of ownership. Although the language of the stat. of 13th Elizabeth, does not, in terms, include such a case, yet it has always been held to extend to it, and even without the statute, the common law provides for it. So early as 22 Ed. 3, when the comparative value of personal property was small, the rule was recognised and acted upon. Whether, however, this position be correct or not, it is certain, that ever since *Twyne's Case*, 3 Co. R. 80, the courts have looked with great jealousy upon a sale of chattels unaccompanied by possession, their inclination being rather to enlarge than to restrict the

[*265] *rule. 3 Ba. Ab. 310 ; *Cadogan v. Kennet*, Cowp. 434 ; *Ryall v. Rowles*, 1 Atk. 167–8 ; *Babb v. Clemson*, 10 Serg. & Rawle, 428 ; *Martin v. Mathiot*, 14 Serg. & Rawle, 214. Even to a mortgage of a chattel, delivery of possession is essential. *Portland Bank v. Stubbs*, 6 Mass. Rep. 425 ; *Lamb v. Dorant*, 12 Mass. Rep. 56, 59. There is a class of cases including trusts, created by marriage settlements, as in *Cadogan v. Kennet*, and where the vendor becomes the agent of the vendee, under peculiar circumstances, as in *Bucknall v. Roiston*, Prec. in Ch. 285, not within the purview of the statute, but the reason of the exception is, that the retention of possession in these cases was absolutely necessary, and constituted the motive for entering into the contract. An attempt has also been made to except conditional sales ; but it has been defeated by the decision of *Clow v. Woods*, 5 Serg. & Rawle, 275, and other cases. Another class of cases, is, where the sale is absolute, but the continued possession of the vendee is consistent with the deed. Some of the courts in this country, following the distinction made by Judge Buller, in *Edwards v. Harben*, 2 T. R. 587, have held, that such a sale, where possession was to be delivered in future, was not in itself void as against creditors. *Dawes v. Cope*, 4 Binn. 265 ; *Hamilton v. Russell*, 1 Cranch, 309. The doctrine of *Edwards v. Harben*, has been, it is believed, departed from in England, and certainly in this country, in the more recent cases, at least so far as the distinction is made to depend upon the simple circumstances of a stipu-

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lation for the retention of the possession being inserted in the contract. The present is the case of an absolute sale of chattels, for the purpose of securing a pre-existing debt, the parties having no other object in view. The possession was to be delivered at a future period. The continued possession of the vendor in such a case, was against the policy of the law, which requires transfer of possession as well as contract. It is not enough to render a contract of sale valid, that it contain a stipulation, that the vendor shall retain the possession. There must be some sufficient motive for such retention, of which the court is to judge. *Sturtevant v. Ballard*, 9 John. R. 339. "The retention of the possession," it is laid down in *Clow v. Wood*, 5 Serg. & Rawle, 278, "must be for a purpose, fair, honest, and absolutely necessary, or at least essentially conducive to some fair object the parties had in view, and which constituted the motive for entering into the contract." This principle is universally recognised as law. *Martin v. Mathiot*, 14 Serg. & Rawle, 214; *Welsh v. Bekey*, 1 Penn. R. 57; *Herron v. Fry*, 2 Penn. R. 263; *Commonwealth v. Stremback*, 3 Rawle, 341. The object of the parties here, was merely to secure a debt due from Williamson to the plaintiffs, and consequently the possession of the vendor was not essentially conducive to the object the parties had in view, and still less was it "absolutely necessary." How far a *bona fide* purchase, in the usual course of business, of an article undergoing a process of manufacture, which could not be removed without material loss, and of which the possession *therefore remains with the vendor, would be valid, it [*266] is not necessary to consider, because this is not such a case. In the case of *Clow v. Woods*, the court seem to have taken it for granted, that the hides could not be removed without deterioration; but in this case it is shown that they might have been, and afterwards actually were removed, before the completion of the manufacture. As to symbolical delivery, which is said to have taken place in this case, that is only available, where peculiar circumstances preclude the possibility of actual possession. *Cunningham v. Neville*, 10 Serg. & Rawle, 201. Finally, this was a secret sale, the property remaining after the sale in precisely the same situation as before, the vendor exercising every act of ownership over it. To permit it to stand, would be to retrace the progressive steps of ages.

The opinion of the court was delivered by

GIBSON, C. J.—It certainly seemed to us in *Clow v. Woods*, that the inconvenience of removing an article contracted for in the hands of the manufacturer, would so account for retention of the possession for a period sufficient to complete the process,

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as to rebut the inference of fraud; and as that case is the first of the series in our courts, it should not be disturbed but on grave consideration. The ground on which the cause was decided there, however, is not the one on which the question is to be determined here; and on mature reflection, I am convinced that it was unnecessarily and improperly conceded. The objection to the title lies deeper, perhaps, than even the legal imputation of fraud, resting, as it seems to do in the very essence of the contract, which, to vest a specific property in the subject of it, must be a contract executed. The distinction between a sale which transfers the ownership, and an agreement to sell and deliver at a day certain, which gives but an action for the breach of it, is a broad one, distinctly understood, and practically observed in the current transactions of business; and I am at a loss to see how its effect can be evaded in a case like the present. Every agreement for a subsequent delivery is essentially executory. The theory of those who maintain that the title passes in the meantime, is, that the artisan remains in possession but as the servant of the customer, the labour and materials to be added by him, being the subject of separate compensation; consequently, that there is, in fact, a present execution of the contract. In point of policy, this would evidently be objectionable, because no purchaser of a finished article in the usual course, would be secure of the title; and in point of reason, it is forced and unnatural, because it is founded on an hypothesis false in fact, that the value of the article in its unfinished state, is the basis of the contract. Was it so considered in the present case, or in any other to be found in the books? The parties dealt expressly in reference to the price which the leather would fetch when fit for the market; and having treated in reference to a future condition of the article, a future price and a future delivery, the contract was necessarily executory, [*267] *as every sale of an unfinished article must be when not sold and delivered as such. Unquestionably, the property in an article made to order, passes but by the delivery of it, because at the time of the order, which is the date of the contract, there was no property in anything to pass; and it will scarcely be pretended, that the accidental existence of a part of the work at the time, would give the customer a specific right to the whole. For instance, an order to finish a coach whose parts were sufficiently formed to individuate it as a whole, would be obnoxious to the objection just stated, as regards specific property in the labour and materials to be added; and it would not vest a specific property in the work on hand, because it was not that, but a finished coach, which was the subject of the contract. Here, however, it is said, that the hides required but to

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be left a few months longer in the vats in order to absorb the tannin from the bark; and in this respect, they have been likened to grain growing, which is a subject of present sale. The evidence proved, however, that labour was still to be expended on them; and beside, a growing crop draws its increase from a process of nature, while hides in a tannery draw theirs from a process of art, which has the peculiar effect of changing the specific character of its subject. The grain, too, is contracted for at its present value, affected, as it must necessarily be, by the prospect of its natural increase, just as a growing animal is affected by the same prospect; and the contract is executed by delivery, as far as it is susceptible of it. But what seems conclusive in all cases of retained possession for purposes of completion, is, that the customer would not be bound to accept the article if it were injured by unskilfulness, or finished in an unworkmanlike manner; and the contract being thus shown to be executory, it would follow that the customer has no property in the thing which he could enforce even against the seller. What then, is the case on the record? The contract was made the thirty-first of July, and the property was to be delivered, not when the process should be finished, but on the twelfth of November ensuing; so that the postponement of delivery not being graduated to the actual exigency, could not be justified even by the exception in *Clow v. Woods*. Independently of that, it appears, that the hides were susceptible of immediate delivery, as the buyer was willing to remove them at his risk, or send workmen to finish them where they were; and the rejection of his proposal to do so, evinced but the determination of the owner to enter into no contract that would presently divest him of the property. Even the price was not definitively fixed; for the skins were to be delivered at the market value, and the seller was to have the benefit of the intermediate rise, if any should occur, even as regards the hides. In the contemplation of both parties, therefore, all was executory. But even had they contracted for the article at the value of it in its unfinished state, the consequence would have been the same; for no form of dealing will turn what is essentially executory into a contract executed, and an apparent evasion *of the rule [*268] which requires a change of the possession, as that would palpably have been, would itself be an index of fraud. Apart from all this, however, it clearly appeared from the testimony, if believed, that both the hides and the skins were susceptible of removal without inconvenience or loss; and if a present sale were intended, it should have been attended with present delivery. On the general principle of *Clow v. Woods*, then, the

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judge was right in charging that the contract did not vest the title in the plaintiff.

Judgment affirmed.

Cited by Counsel, 6 Wh. 134; 5 W. 202; 6 W. 31; 2 W. & S. 150; 3 W. & S. 18; 7 W. & S. 374; 6 Barr, 448; 7 Barr, 263; 10 H. 171; 12 H. 16; 1 G. 30; 25 S. 302; 30 S. 362; 14 W. N. C. 166.

Cited by the Court, 6 C. 542.

Explained and distinguished, 3 W. N. C. 299.

[PHILADELPHIA, MARCH 29, 1833.]

Case of the Estate of Jacob Gerard Koch, Deceased.

MANDAMUS.

A decree of distribution protects an administrator from the consequences of a mispayment in rendering obedience to it

An administrator may appeal from a decree of the Orphans' Court distributing the balance of an intestate's estate in his hands, although he is not a "party aggrieved," within the words of the 59th section of the act of Assembly of 29th of March, 1832, "relating to Orphans' Courts." He is not a stranger, but a trustee for the parties, beneficially entitled, and the representative of those who may have been aggrieved.

The quantum of security to be taken by the Orphans' Court, upon an appeal from a decree of distribution, is a matter for their discretion, and is not necessarily to be measured by the quantum of the estate.

THIS case arose upon a rule to show cause why a mandamus should not issue directed to the Orphans' Court of *Philadelphia* county, to allow an appeal from the decree of distribution made of the estate of Jacob Gerard Koch, deceased, and upon the hearing, the case was this: H. M. Meschert, and H. Meschert, the administrators of Jacob Gerard Koch, filed their accounts, and upon their regular confirmation there appeared to be a balance in their hands in money and stock for distribution, of one million forty thousand seven hundred and seven dollars and fifty-two cents. This balance was claimed by the widow of the deceased, and by his collateral relations resident in Germany, Holland, and Italy. Jacob Gerard Koch was a naturalized American citizen, formerly a resident of Philadelphia, but had for many years previous to his decease, resided at Paris in France, where he died intestate, in the year 1830. Administration was granted upon his estate to M. H. and H. Meschert, his brother-in-law and his wife's nephew, in April, 1831, by the register of wills of the county of Philadelphia. On the 2d of October, 1832, the Orphans' Court appointed three auditors, "to distribute the funds in the hands of the administrators according to law," who on the 6th of October, 1832, gave notice

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in two daily newspapers published *in Philadelphia, that they would meet for that purpose on the 17th of [*269] October, 1832, at four o'clock in the afternoon of that day, at the Adelphi, in the city of Philadelphia, but no other notice was attempted to be given to the parties interested. The auditors made their report on the 3d of November, 1832, which was filed on the 17th of November, 1832, distributing the funds in the hands of the administrators to the widow and eleven persons, whom they reported to be collateral relations and next of kin of Jacob Gerard Koch, some of whom were minors. Before the auditors, John Sergeant, Esquire, appeared as counsel for all the next of kin, and Mrs. Koch, the widow, was represented by the administrators, who held her power of attorney. The administrators appeared in person and by counsel before the auditors.

Upon the filing of the auditors' report, it was confirmed, and the court, being satisfied by the statement of the parties, that there was no probability of any outstanding debt or debts, ordered and decreed distribution to be made to the several persons mentioned therein, according to the report; the said persons giving bonds with sufficient securities against any debt or debts which might hereafter be discovered, agreeably to the act of assembly; the amount of the bonds in the whole, to be two hundred thousand dollars; the bond for the widow's moiety to be in one hundred thousand dollars, and those of the next of kin, in their respective portions of one hundred thousand dollars.

On the 21st day of December, 1832, Maria A. Leisman, Francis Binkhorst and wife, P. Van Cranenberg and wife, G. L. Koch, J. J. Koch, and Maria G. Koch, to whom shares of the funds in the hands of the administrators were reported as next of kin of Jacob Gerard Koch, presented their petition to the Orphans' Court, referring to the decree of distribution, and setting forth, "that being aliens, resident in Europe, they find it very difficult to obtain the requisite sureties to offer the court, and do not know when it will be in their power to obtain them, but they are willing for the present, and until sureties can be had, to leave in the hands of the administrators a portion of their respective shares, equal in amount to the sum in which they are required to give bonds, that is to say: (setting forth the amounts) the said amounts respectively to remain in the hands of the administrators, until other satisfactory security shall be given by each of your petitioners," and praying the court to decree, that the administrators "should pay to them respectively, or to their agent duly authorized, the amount of their respective shares, save and except the sums mentioned, to

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remain in the hands of the administrators, for the purposes and upon the terms mentioned."

On the 21st of December, 1832, the administrators of Jacob Gerard Koch presented a petition to the Orphans' Court, stating "the death of said Koch at Paris, out of the jurisdiction of the United States, that his family and next of kin were believed, at the time of his death, to have been residents out of the United States, and still continued to so reside: That no such notice as [*270] is contemplated by the 20th section *of the act of assembly of Pennsylvania, passed on the 29th of March, 1832, entitled "an act relating to Orphans' Courts," has (so far as the petitioners know) been given to the distributees or creditors of the deceased residing out of this state, or out of the United States, of the settlement of the accounts of the administrators, or of the distribution of the assets or surplusage of the said estate: That by the said act of assembly, three years, after the definitive sentence or decree, are allowed to any person aggrieved by the said decree of the Orphans' Court, to appeal from the same to the Supreme Court of Pennsylvania: That the petitioners are but stakeholders, and whilst acting in good faith and for the benefit of all concerned, as such are entitled to receive full security against personal loss; and praying the court, that no person or party heretofore named as entitled to a distributive share of the estate of the said Jacob Gerard Koch, in the decree made on the 17th of November, 1832, should receive the same, unless such person or party should previously give approved security to the administrators, to return to them or their successors, such proportion of the money as may be required to comply with any alteration or modification of the said decree made in consequence of any appeal therefrom made within three years from its date, and that the court would take such other measures in the premises as to the court in justice should seem meet."

These two petitions, upon being presented to the court, were ordered to be filed. On the 9th of January, 1833, the court ordered and decreed that the petition of the administrators should be dismissed and overruled; and on the 10th of the same month granted the prayer of the petition of Maria A. Leisman, and others, and decreed that the administrators should pay as therein prayed.

From the decree of distribution as finally made, the administrators offered to appeal to the Supreme Court, made the affidavit required by law, and offered their recognizance, with the same persons as sureties who were sureties in their administration bond, in the sum of two millions one hundred thousand dollars, to prosecute such appeal with effect.

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The Orphans' Court, having doubts as to whether the administrators had a right to appeal from a decree of distribution, and the case being one of the first impression, the first since the passage of the act of assembly "relating to Orphans' Courts," and the amount of the estate very considerable, the rule for a *mandamus* was moved for and obtained at the suggestion of the Orphans' Court, in order that the opinion of the Supreme Court might be taken on the question.

Ingraham (with whom was *Tilghman*,) in support of the rule. It can hardly be supposed that the provisions of the twentieth and fifty-second sections of the act of 29th of March, 1832, (Pamph. Laws, 190,) were intended to have no operation, or that the legislature when they provided in a statute, made two weeks previous to *that "relating to Orphans' Courts," that the register should give four weeks' notice of the filing [*271] of an executors or administrators account in his office, (act relating to registers' and registers' courts, sect. 30, passed the 15th of March, 1832, Pamph. Laws, 135,) meant that distributees living in Europe, some of whom are minors, should have their rights concluded by a decree, made upon eleven days' notice, as in this case, in a language which, probably, not one of them understood, and that the administrators, the trustees of the estate for the parties beneficially entitled to it, should not have the right to interfere, because the decree might be a protection to them; though it is not a settled point, that the administrators could set up this decree as an adjudication against persons not named in it. 1 Stark. on Evid. 191, edit., 1828. It is indeed difficult to say, what answer administrators could make to a distributee resident in Holland, and whose share was not awarded to him, upon proceedings terminated as these have been; for an administrator, as a trustee, is bound to see that a reasonable chance is afforded to all those he is trustee for, to assert their claims, and that their rights should not be cut off by a proceeding which, upon such notice as has been given in this case, may well be termed a mockery. The appeal, therefore, is a matter of right to the administrators; for, unless he can appeal for a distributee, the estate will be gone without remedy for any one aggrieved, who, in a distant country may not hear of the proceeding till the three years are gone by.

Purdon and *Sergeant*, against the rule.—The argument in regard to notice would, if there were any real ground for apprehension, have been properly addressed to the auditors, who, upon a proper case made out, would have granted time to give, or would have given themselves a longer notice, but it is too

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late to take that ground after a decree is made. There is no suggestion here, supported by affidavit, as it ought to be, that the administrators know of, or have reason to believe that there is any person not included in this distribution, whose rights are likely to be prejudiced, and from their connection with Mr. Koch's family, they are able, if such person existed, to lay such a foundation for tying up this fund for three years by appeal. But in point of fact and law, the administrator is not "a party aggrieved" within the meaning of the fifty-ninth section of "the act relating to Orphans' Courts." This decree will be a complete protection to him, and no possible injury can result to him, which can be remedied by allowing him to appeal.

The opinion of the court was delivered by

GIBSON, C. J.—The right of the administrator to appeal is resisted, because he is not, in the language of the act, "a party aggrieved," the decree of distribution being adequate to his protection from the consequences of a mispayment in rendering obedience to it. He is undoubtedly not aggrieved by it in his [*272] own person, and the argument *is certainly an imposing one; but in giving the first impression to the construction of this law, we must look beyond its letter and interpret it liberally, in furtherance of convenience and justice.

The administrator is not a stranger, but a trustee for the parties beneficially entitled; so that it requires but little violence to the letter, and certainly none to the spirit of the law, to treat him, in circumstances like the present, as the representative of those who may have been aggrieved. The actual parties we are informed reside in Germany, Italy, and Holland, and if denied the benefit of an appeal by their trustee, would be concluded by a decree from which they have had no opportunity to appeal for themselves. As the case has been stated at the bar, notice was published in this city on the 6th day of October, that the auditors would meet to distribute the estate on the seventeenth of the same month; and on the third of November following distribution was decreed, by which the rights of the claimants would be found to the value of a million and a quarter of dollars.

It is true, they would have three years from the final decree to appeal for themselves; but the fund would go, in the meantime, into the hands of the distributees, without security to refund it in case of a reversal. It may be that no loss would be incurred by that; but the actual parties have had neither hearing nor opportunity to obtain it, and it seems reasonable to suffer their trustee to obtain it for them, the funds remaining with him in the meantime under the guarantee of his adminis-

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tration bond. Had they actually appeared, or refused to do so, his authority, in this respect, would have been superseded; but under the circumstances, it would seem consistent with expediency and justice, to treat him as their representative with power to appeal for all.

As to the *quantum* of the security to be given, it is necessary to say no more, than that it is a matter for the discretion of the Orphans' Court. Yet it may not be improper to intimate, that the security is not necessarily to be measured by the *quantum* of the estate, which is presumed to be already secured in the hands of the administrator. Under the effect of any other rule, the very magnitude of the injury from an erroneous decree might deprive the party of his remedy. The court will take care, that the interests involved will be fully secured as to costs, compensation for delays, or any other matter that may affect the claimants incidentally, and the necessary discretion therefore is wisely deposited where a superior knowledge of the circumstances enables the court to graduate the security to the exigencies of the particular case, by requiring what is adequate to the purposes of perfect protection, and no more.

Let the rule be made absolute.

Rule absolute.

Cited by Counsel, 9 W. & S. 152; 4 Wr. 234.

Cited by the Court, 10 Barr, 262.

Distinguished and said to be applicable only to the peculiar circumstances of the case, 8 C. 130.

*[PHILADELPHIA, MARCH 29, 1833.]

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Marsh *against* Pier.

IN ERROR.

In replevin, where the defendant pleads "property," there is still such a burthen of proof on the plaintiff, as to entitle him to commence and conclude to the jury. But

It seems, that if the court below had ruled differently, it would not have been cause for reversal on writ of error. (Per Kennedy, J., the rest of the court giving no opinion on the point.)

A verdict and judgment between the same parties or their privies, on the same subject-matter, though in a different form of action, is admissible and conclusive.

Therefore, if P. brings an action for the price of goods against N., the record of the judgment is admissible and conclusive on the issue of property in replevin for the same goods, brought by P. against a purchaser under N.; and this whether the judgment be for the plaintiff or the defendant in the first action.

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An action for the price of goods, when prosecuted to judgment, is an affirmation of the sale; and the right to make such a sale cannot afterwards be gainsaid.

It is not necessary to plead the former judgment, to make it either admissible or conclusive.

A bill of particulars, if proved to be genuine, is evidence to show the precise subject-matter of an action.

On the issue taken in replevin on the plea of property, a general judgment for the plaintiff with damages, without specifying the value of the goods, *eo nomine*, is good. (Per Kennedy, J., the rest of the court giving no opinion on this point.)

THIS was a writ of error to the District Court for the city and county of *Philadelphia*.

Sylvester Pier, the plaintiff below and defendant in error, declared in replevin for ninety-seven tons of Campeche logwood, taken and unjustly detained by the defendant, James Marsh, to which the defendant pleaded "property." The plaintiff replied, and issue was joined. The cause was tried at June Term, 1832, and a verdict and judgment rendered for the plaintiff, for three thousand and forty-seven dollars and thirty-nine cents damages, and six cents costs. On the trial, the following facts appeared in evidence:

The plaintiff was, in the month of October, 1828, owner of the brig Sally Barker, of which Captain John H. Marshall was master. The brig was built in the year 1809, at Duxbury, Massachusetts, and was purchased by the plaintiff on the 3d of June, 1828, for one thousand dollars. On the 27th of the same month, she sailed from New York to Tabasco, consigned to P. N. Paillet, with a cargo of copper. By letter of instructions, the captain was directed to consult the consignee on his arrival, and the consignee was instructed to remit the proceeds of the shipment in logwood. On the arrival of the brig at Tabasco, a quantity of logwood was put on board by order of the consignee, on account of the plaintiff. Captain Marshall refused to sign the bills of lading. On the 11th of September, 1828, the brig sailed from Tabasco for New York, and, after being at sea three or four [*274] days, her course was altered, and, in consequence, as was contended by the defendant, of her being leaky and unfit to continue her voyage, she went to New Orleans, where she was regularly surveyed, condemned, and sold.

The wood was sold at New Orleans by W. Nott & Co., under the instructions of the captain, to S. P. Morgan & Co., without notice to them, at seventeen dollars and fifty cents per ton; the proceeds of the sale were one thousand seven hundred and nine dollars and sixty-five cents. It was shipped on the bark Hercules, consigned to C. Price & Morgan, at Philadelphia, and by them sold to the defendant, who bought without notice and *bona*

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fide, at twenty-six dollars per ton, cash, or two thousand five hundred and twenty-two dollars and seventy cents. At the time of the sailing of the *Hercules* from New Orleans, there were vessels waiting for freight to New York. By the account-current of Nott & Co., with Captain Marshall, a balance appears in his favour of one thousand and eighty-six dollars and twenty-five cents, and on the 22d of October, 1828, he is credited with their draft at sixty days' sight, on F. Depau, for one thousand one hundred dollars. On the 4th of October, 1828, W. Nott & Co. advised the plaintiff, by letter, of the sale of the brig and cargo, which letter was received on the 1st of November. On the 27th of October, 1828, W. Nott & Co. addressed a letter, with account-sales and account-current, to the plaintiff, and advised him of their draft on Depau. On the 1st of December, 1828, the plaintiff wrote to W. Nott & Co., acknowledging the receipt of their letters of the 4th and the 27th of October, with the accounts, and disaffirming the sale at New Orleans. The condition of the brig at New Orleans was proved by witnesses, examined under commissions to New Orleans. Charges for freight, &c., on the wood from New Orleans to Philadelphia were also proved.

On the 1st of November, 1828, the plaintiff served a notice on the captain of the *Hercules*, and on C. Price & Morgan, claiming the logwood as his property. The sale by C. Price & Morgan to the defendant, Mr. Marsh, was in the latter part of November, and the replevin issued the 27th of November, 1828.

The correspondence of the plaintiff with the consignee, Captain Marshall, and W. Nott & Co., were read to the jury by the defendant.

The defendant also offered to show that the plaintiff, at October Term, 1829, brought an action in the Superior Court of the city of New York, against W. Nott & Co., to recover the value of the logwood, &c., on board the brig *Sally Barker*, and in his declaration counted against W. Nott & Co. as his agents, in which action judgment was rendered for the defendant.

After the jury had been sworn, the defendant's counsel claimed, as their right on the pleadings, to commence and conclude; this was refused by the court, and constitutes the first exception.

The plaintiff below in the course of his testimony offered in evidence the deposition of Charles Rust, taken under a commission to *New York, in the course of which, the witness testified as follows: "When the logwood was all on board, deponent handed bills of lading to Captain Marshall, and requested him to sign them, to which Captain Marshall replied, 'he would be damned if he would,' and refused to sign

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them, and kept them, and deponent never saw them again." To this portion of the deposition, the defendant's counsel objected, but the objection was overruled.

The defendant, among other things, offered to read in evidence a regular exemplification of the record of a suit in the Superior Court of the city of New York, in which Sylvester Pier was plaintiff, and W. Nott & Co. defendants, in which judgment was rendered for the defendants. (The subject of this action is particularly stated by Judge Kennedy, in delivering the opinion of this court.) To this the plaintiff's counsel objected, and the objection was sustained.

The defendant's counsel then offered the same record in conjunction with a bill of particulars, purporting to apply to the general counts of the declaration in the New York suit. This was also rejected.

The defendant's counsel requested the court to instruct the jury as follows:

1st. That in consequence of the plaintiff receiving intelligence of the sale of his logwood at New Orleans, on November 1st, 1828, and not disaffirming it, and disavowing the agency of the master till 1st of December, 1828, when he wrote to that effect to Nott & Co., he in law affirmed the agency of the master and the sale, and ought not to recover in this action.

2d. That the plaintiff was bound in law, immediately on receiving W. Nott & Co.'s letter of October 27th, 1828, to give notice to F. Depau of New York, on whom they had drawn at sixty days' sight for the balance of the proceeds of the logwood, and to stop the payment of the said draft, and that having neglected to do so, he was barred of his recovery in this action.

3d. That in case the jury should be of opinion that the plaintiff was entitled to recover the value of the logwood, according to the sales to the defendant at Philadelphia, the defendant was entitled to a deduction for freight from New Orleans to Philadelphia, and charges.

On these points the judge charged the jury:

1st. That the plaintiff was not bound to disaffirm the agency and sale sooner than he did, but if he delayed writing to Nott & Co. till the 1st of December, 1828, in order to be apprised of all the circumstances of the agency and sale, and then disavowed them, and did not merely stand by in order to make up his mind, he was in time.

2d. That the plaintiff was not bound to give notice to F. Depau, or stop the draft.

3d. That the defendant was not in law entitled to any allowance or abatement for freight or charges, but there being something like equity in it, they might make the allowance or not as

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they pleased. To all these instructions the defendant's counsel excepted. Besides *the above exceptions, error was assigned in the form of the verdict and judgment, which [*276] were generally for the plaintiff, with damages and nominal costs.

W. B. Reed and *W. M. Meredith*, for plaintiff in error.

1. In *replevin*, where the plea is property, the defendant is entitled to commence and conclude, because he has the affirmative of the issue. The plaintiff in his narr. alleges caption and unlawful detention. The defendant's plea does not deny the caption or detention, but alleges a right of property, which the plaintiff in his replication denies. The issue is then on the plea of property, and on that issue the defendant is first in affirmative. The first disputed affirmation, is the defendant's of property in himself. No express authority is to be found in the books, but there are some cases strongly analogous. In a note to 15 Petersdorff, C. L. Ab. 163, it is laid down, that whoever adds, the *similiter* begins. In a writ of right, where issue is on the mere right, the tenant, and not the demandant begins. *Heidon & Igrave's Case*, 3 Leon. 162; *Gilbert's Evid.* 145; *Trials per pais*, 36-7. So in an action of covenant, and a plea "covenants performed." *Norris v. Am. Insurance Company*, 3 Yeates, 84, 86—so *Delaney v. Regulators of City*, 1 Yeates, 403; so in trespass where the plea is "*liberum tenementum*." *Leech v. Armitage*, 2 Dall. 125. So where in trespass, *quare clausum fregit*, the defendant pleads as to part, not guilty, and as to the residue, justification under a right of way. 3 Starkie on Evid. 385, 377; *Roscoe on Evid.* 132. If the plea be "property in a stranger," it may either be pleaded in bar or abatement. Bull. N. P. 54. And where issue is taken on the plea in abatement, defendant begins. 3 Starkie's Ev. 385. But there is one express authority. Where in *replevin* the taking is admitted, and the affirmative of every issue lies on the defendant, as where he pleads *liberum tenementum* in trespass, his counsel are entitled to begin and reply. 4 Starkie on Evid. 1295. It is not the mere order of addressing the jury which is claimed, which was the case in *Robinson v. Whitesides*, 16 Serg. & Rawle, 320, but it is the order of giving evidence, and it is not *damnum absque injuria*. Safe principles are laid down in *Snyder v. Bauchman*, 8 Serg. & Rawle, 336. The court has a right to make rules conformable to the law of the land, but no further.

2. The declarations of Captain Marshall to Charles Rust, were not evidence on any principle. They were hearsay clearly, and as such inadmissible. His refusal to sign bills of lading was a fact, but what he said was a declaration only calculated

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to prejudice the jury. But besides, it was irregular to introduce this evidence at the time it was offered.

3. The record of the suit in New York, ought to have gone to the jury. Its effect, if admissible, is a secondary question, but it was both admissible and conclusive. The defendant, Marsh, is a *bona fide* purchaser, without notice, from the plaintiff, through the agency of Nott & Co. at New Orleans, which [*277] agency the plaintiff in this suit disavows. *In the suit in New York, relating to the same subject-matter, the logwood, the plaintiff counts against Nott & Co. as his agents, and seeks to recover the price of this very logwood. As the record of a suit and judgment between the same parties or their privies, on the same cause of action, it is admissible and conclusive, whether pleaded or not. The authorities are clear on this point. Ferrer's Case, 6 Rep. 7; s. c. Cro. Eliz. 668; Sparry's Case, 5 Rep. 61; Hitchin v. Campbell, 2 W. Bla. 827; 3 Wilson, 308; Kinnersley v. Orpe, 2 Doug. 517; Calhoun v. Dunning, 4 Dall. 120; M'Kinney v. Crawford, 8 Serg. & R. 351; Stokely v. Alexander, 7 Ib. 299. It is not necessary that parties nominally should be the same, or that the judgment be pleaded. Heydon's Case, 11 Rep. 5, 6; Co. Lit. B. 3, sect. 376, n. 144; (2 Thomas's Coke, 129;) Hostetter v. Kauffman, 11 Serg. & Rawle, 146; Bird v. Randall, 3 Burr. 1353. Where both actions appear on the record to be for the same thing, the court will not put a party to plead. Garvin v. Dawson, 13 Serg. & Rawle, 247; Cist v. Zeigler, 16 Serg. & Rawle, 282; Estep v. Hutchman, 14 Ib. 435; Floyd v. Brown, 1 Rawle, 125; 8 Wendell, 1. In this case, the court held, that a judgment in an action of trespass for carrying away goods, is a bar to an action of *indebitatus assumpsit* for the proceeds of the sale of the goods which were the subject of the trespass. In Lamine v. Dorrell, 2 Ld. Raym. 1216, a former judgment in *assumpsit* was held to be a bar in trover. So in Stafford v. Clark, 2 Bingham, 377; (9 C. L. Rep. 437.) In an action for money had and received, the plaintiff goes only for money received, and so far confirms the defendant's act, as that he cannot gain-say his right to receive it. Eastwick v. Hugg, 1 Dall. 222. On these authorities it is contended, that as between these parties or their privies, this record was competent evidence whether as a bar to this action, or as a fact showing a confirmation of the agency of the master and of Nott & Co., and that too without its being pleaded.

4. The rejection of the record by the court below, rendered the offer in evidence of the bill of particulars, nothing but a formal offer. This point need not be pressed.

5 and 6. On these points and the principle involved in

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them, that a principal ought, as soon as he is informed of the unauthorized act of his agent, to disaffirm it, and if he does not, that he cannot recover against a *bona fide* purchaser without notice, the following authorities were cited. Ward v. Evans, 2 Salk. 442; 2 Starkie's Ev. 58. A principal is bound to disavow the unauthorized act of his agent, the first moment it comes to his knowledge, says C. J. Gibson, in Bredin v. Dubarry, 14 Serg. & R. 30. See also 1 Fonblanque Eq. c. 3, s. 4, p. 161; 2 Vernon, 151; Hansdon v. Cheyney, 1 P. Wms. 393; Mocatta v. Murgatroyd, 1 Vernon, 136; Hobbs v. Venter, 1 Vesey, 95; Arnott v. Biscoe, 2 Bro. Ch. Rep. 420; 13 Serg. & Rawle, 306; 3 Serg. & Rawle, 283.

7. If the amount of the sales at New Orleans be the measure of damages, then the defendant is entitled to no abatement for freight *and charges; but the jury having taken as the measure, the sales at Philadelphia, such an allowance [*278] ought to be made. Case of The Fanny, 9 Wheaton, 658. A *bona fide* purchaser from a piratical captor is entitled to freight for carrying goods, though it be out of the direct line of the voyage.

8. The judgment should not have been general, for the plaintiff with damages, but distinctly for the value of the goods, and damages for the detention. The plaintiff is entitled to a return of the property or its value, and if so, the defendant has a right to make a return in specie with damages for the detention, which he cannot do under this judgment. The gross amount of three thousand and forty-seven dollars and thirty-nine cents, includes both the equivalent for the goods and the damages, which the court cannot separate. It has been decided in this state, that such a general judgment is error. Easton v. Worthington, 5 Serg. & Rawle, 130. In a verdict for the plaintiff in *replevin* on the plea of property, the jury should find the value of the goods and assess the damages for detention. Warner v. Augenbaugh, 15 Serg. & Rawle, 9; 6 Com. Dig. 3, k, 30; Co. Litt. B. 2, cap. 12, sect. 219, note, 1456. Also, Coke's Entries, 610-611.

J. R. Ingersoll and *Chauncey*, for the defendants in error.

1. The order of addressing a jury is a matter purely within the discretion of the court below, whose decision upon it is not the subject of error. Even if it be otherwise, the court below were right in their decision. The action of *replevin* is peculiar; for though on the plea of property, the defendant is strictly the first in the affirmative, yet there is a burthen of proof on the plaintiff. 6 Harris & Johnson, 499. In this case the actual

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burthen of proof was on the plaintiff. Gilbert on Replevin, 98, 100, 126 ; 6 Bacon's Ab. 53, 65, 73.

2. In regard to Captain Marshall's declarations, it is only necessary to say, that his refusal to sign the bills of lading, being proved as a fact, renders it unnecessary to prove the manner and language in which he did it. But besides, the defendant below is here acting under Captain Marshall, in privy with him.

3 and 4. As to the record of the suit in New York ; it ought to be the whole record, which this is not, as there is no *capias* or return ; they ought to be set out at length. Bull. N. P. 223, 227. It ought to have been pleaded or offered in evidence on notice. Gould's Pleading, 336. In all the cases cited by the plaintiff in error, where the former judgment was relied on as a collateral bar, it was pleaded ; in all others it was between the same parties, and on precisely the same subject-matter. In *Hostetter v. Kauffman*, 11 Serg. & Rawle, 146, it was agreed not to plead the record. In *Bird v. Randall*, 3 Burr, 1353, and in *Cist v. Ziegler*, 16 Serg. & Rawle, 282, the parties in the two suits were the same. In *Hitchin v. Campbell*, 2 W. Bl. 827, and in *Floyd v. Browne*, 1 Rawle, 125, it was pleaded. See also, 1 Tidd, 703, last edition. The rule strictly confines the admission of such records to decrees or judgments, between [*279] *the same parties on the same subject-matter. No one can be bound by a verdict or judgment to which he was a stranger, which may have resulted from the negligence of another, or been procured by fraud or collusion. 2 Starkie's Ev. 185, 6. The judgment of a competent tribunal is not evidence of any matter to be inferred by argument from the judgment. *Ib.* 190-1, 195-6, 198-9. The former judgment must be final and conclusive. 4 Starkie's Ev. 205. The judgment in the New York suit, wanted nearly all these requisites. 1 Phillips's Ev. 230, 142 ; 4 Starkie's Ev. 1278. The bill of particulars here was not proved, and we have no mode of ascertaining whether it is genuine or not. Until it is proved, there is no mode of ascertaining whether the former judgment related to the same subject-matter.

5 and 6. As to the disaffirmance of the agency, and the want of notice to F. Depau. Nott & Co. were not entitled to notice, and if they were, it should be remembered that the letter of the 4th of October, 1828, promised an account-sales, for which the plaintiff had a right to wait without disaffirming the sale. 1 Livermore, 50 ; 12 Johns. 300, does not fully bear out the point stated by Livermore. 1 Johns. 110 ; 1 Caines, 539, 589 ; *Curcier v. Ritter*, 4 Wash. C. C. Rep. 553, 569. For what purpose the principal waited before disaffirming the agency, is a question

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for the jury. But besides, there was notice on the 1st of December, to C. Price & Morgan, and to Captain Longcope. As to notice to Depau, the plaintiff was not called on to give it; indeed if he had, it would have looked like an affirmation of the agency. Suppose the draft had been negotiated, as it probably was, what would be the effect?

7. As to the allowance of freight and charges, the case of *The Fanny*, 9 Wheaton, 658, is a peculiar case of prize law. The logwood was not chargeable with freight, as no freight was paid on it, (the *Hercules* belonging to C. Price & Morgan,) and was brought to a place in Philadelphia, where the plaintiff had no occasion for it, and did not want it. They cited also *The Leander*, 5 Rob. Adm. Rep. 67; and *The Vrow Anna Catharina*, 6 Rob. 271.

8. As to the form of the judgment, the case of *Easton v. Worthington*, 5 Serg. & Rawle, 130, cited on the other side, is conclusive in our favour. See also, *Hosack v. Weaver*, 1 Yeates, 478; *Hardy v. Metzgar*, 2 Yeates, 347.

The opinion of the court was delivered by

KENNEDY, J.—This was an action of replevin, and was commenced on the 27th of November, 1828, in the District Court for the city and county of Philadelphia, by the defendant in error, against the plaintiff in error, for the recovery of ninety-seven tons of logwood, claimed by the plaintiff below as his property, to which the defendant there, by his plea, put in on the 25th of March, 1829, also asserted his right of property. Issue was joined on the plea of property alone, after which the cause was tried by a jury, on the 21st day of April, [*280] *1832, and a verdict given in favour of the plaintiff for three thousand and forty-seven dollars thirty-nine cents damages, upon which the court rendered a judgment in favour of the plaintiff, for the amount of the damages so found by the jury, and his costs.

On the trial of the cause in the District Court, the plaintiff there, in order to establish his right of property in the logwood, gave in evidence, that in the beginning of September, 1828, it was purchased of the owners thereof for him at Tabasco, and put on board of his vessel, the brig *Sally Barker*, then at that place, and under the care of John H. Marshall, employed by Sylvester Pier, the plaintiff below, as the captain and master of the brig, to bring her with the cargo to the city of New York, where the plaintiff then resided. Three or four days after the captain sailed from Tabasco, with the logwood as his cargo, he fraudulently, as was alleged by the plaintiff, and under a false pretence of the brig's being leaky and unfit to make the passage

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good to New York, changed his course and went to New Orleans. There he had a survey made of the vessel, which was condemned. He placed her with the logwood under the authority of William Nott and John Parker, commission merchants at that place, to be sold by them. The logwood weighing in all ninety-seven tons thirteen hundred three-quarters and fourteen pounds, was sold by these gentlemen to Samuel P. Morgan & Co., at seventeen dollars and fifty cents per ton, who transmitted it by the bark Hercules to Philadelphia, consigned to Messrs. C. Price & Morgan, of that place. It arrived there about the 28th of October, 1828, and about five weeks afterwards was sold by these last-named gentlemen to the defendant below, James Marsh, at twenty-six dollars per ton cash. On the 30th or 31st of the same October, Sylvester Pier, the plaintiff, residing still at New York, received a letter from William Nott & Co., advising him of their having sold the logwood, at seventeen dollars and fifty cents per ton cash, and of the disposition made of the proceed thereof by them. On the 1st day of November, then next following, Sylvester Pier, having come to Philadelphia, found the logwood there on board the bark Hercules, and immediately caused a written notice to be given to William Longcope, the captain of the Hercules, and likewise to Messrs. Price & Morgan, that he claimed the logwood as his property, and at the same time demanded the delivery of it, and forbade them to dispose of it to any other, as he would hold them responsible to him for it.

The defendant below, on the trial of this cause, in order to sustain his plea, among other things, offered to read in evidence to the jury the exemplification duly certified, of a record of a judgment rendered in the Superior Court of the city of New York, in favour of William Nott above named, in a suit brought by Sylvester Pier, the plaintiff below in this case, against him and John Parker, above named, the latter of whom was returned by the sheriff upon the writ of *capias ad respondendum*, commencing the suit, "not found." The cause of action as set forth [*281] in this exemplification is contained in nine counts, *the first of which, after stating that William Nott and John Parker, as the agents of the said Sylvester Pier, took possession of the vessel, called the Sally Barker, and cargo, consisting of one hundred tons and upwards of logwood, of the value of three thousand dollars, for the purpose of taking care of and preserving the same for the said Sylvester Pier, and in consideration of a reasonable reward to be paid to them, they undertook and promised the said Sylvester Pier to take care of the vessel and cargo, to keep the same safely for him, and to deliver the said vessel and cargo to him, when they should be thereunto

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afterwards required ; yet the said Nott and Parker did not take due and proper care of the said vessel and cargo, or either of them, or any part thereof, or deliver the same to the plaintiff, but on the contrary, without necessity or justifiable cause, and contrary to their duty and promise, and against the will of the plaintiff, on the 10th day of October, 1828, at New Orleans, caused the said vessel and cargo to be sold, whereby the said vessel and cargo became and were wholly lost to the said Sylvester Pier.

The second and third counts, are for breaches of promises nearly of the same import as in the first count, except that it is not alleged that the defendants sold the vessel and cargo.

The fourth count, is upon a promise stated to have been made by the defendants to the plaintiff, that they in consideration of his having delivered to them, at their request, the logwood, of the value of three thousand dollars, and having made a promise to pay them a reasonable reward, would take care of the logwood and reship it at New Orleans on board of some vessel bound for New York, for and on account of the plaintiff, which they failed to perform, whereby he lost the whole of it.

The fifth count, is for a breach of promise in respect to the vessel alone, which is alleged to be of the value of two thousand dollars.

The sixth count, is upon a promise stated to have been made by the defendants to the plaintiff, to account to him for divers goods and merchandises belonging to him, of the value of five thousand dollars, delivered to them at their request by the plaintiff, to be sold and disposed of by them for him, and which they accordingly sold at New Orleans, on the 20th of October, 1828, amounting in the whole, to five thousand dollars, but failed to account for the same.

The seventh count, is for a breach of promise to account for other goods of the value of five thousand dollars, put into the hands of the defendants by the plaintiff.

The eighth count, is upon a promise to pay five thousand dollars lent, five thousand dollars paid, laid out and expended, and the like sum had and received.

The ninth and last count, is upon an account stated, in which it is averred, that the defendants were found indebted to the plaintiff in other five thousand dollars.

To this exemplification being read in evidence to the jury, the counsel for the plaintiff below objected ; and the court thereupon overruled the evidence ; to which opinion of the court [*282] the defendant below excepted and has assigned it here, as the ground of his third error.

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The defendant below, then offered to read in evidence to the jury, the same exemplification in connection with a writing purporting to be a bill of particulars, drawn up in the following terms, to wit :

"Sylvester Pier *v.* William Nott and John Parker. Bill of particulars of the plaintiff's demands under the sixth, seventh, eighth, and ninth counts of his declaration, reserving to himself the right to recover damages under all or any of the preceding counts.

- "1828. October 3d. Value of the brig Sally Barker, John H. Marshall master, her sails, rigging, tackle, and furniture, arrived at New Orleans from Tabasco, and put under the defendants' care and control at New Orleans, at or about this date, to be sold and disposed of by the defendants, and to be accounted for by them to the plaintiff, \$1,500 00
- "One hundred tons of logwood, which arrived in the said vessel and composed her cargo, also put into the hands of the defendants, or under their care and control, to be sold and disposed of, and to be accounted for by the defendants to the plaintiff. Value of the same at twenty-eight dollars per ton, \$2,800 00
- "October 10th. Cash received by the defendants for 97 tons 13 cwt. 3 qrs. 14 lbs. logwood belonging to the plaintiff, and sold by the defendants to S. P. Morgan & Co., at New Orleans, at \$17.50 per ton, \$1,709 65
- "October 20th. Balance of account stated and rendered by the defendants to the plaintiff, dated New Orleans, 20th October, 1828, being account of sales, and net proceeds of logwood, received by the brig Sallie Barker, from Tabasco, . . . \$1,589 42
- "October 22d. Cash received by the defendants from sales of the hull, masts, sails, and rigging of the brig Sally Barker, belonging to the plaintiff, \$441 88
- "Money had and received by the defendants, at New Orleans, to and for the use of the plaintiff, \$2,020 25

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"Balance of an account, stated by the
defendants, to and with the plaintiff,
dated New Orleans, 22d October, 1828, \$2,020 25

"Interest on the above sums respectively,

"W. T. M'COUN,

"Attorney to the plaintiff."

*The reading of the exemplification in connection with this bill of particulars in evidence to the jury, was [*283] also objected to by the plaintiff's counsel, and the evidence overruled by the court, and exceptions taken thereto by the defendant below, which is the ground of his fourth error assigned.

As the first, third, fourth, and eighth errors assigned are all that I intend to notice, by giving my own opinion on the first and eighth, and that of this court on the third and fourth, it is deemed unnecessary to state further the proceedings had on the trial of the cause in the court below.

Upon the first, second, fifth, sixth, seventh, and eighth errors, which embrace all that have been assigned after the third and fourth, this court, owing to the great press of business and want of time, have come to no settled conclusion, but thinking it probable that the opinion which they have formed on the question involved in the third and fourth errors may determine this case finally, have therefore thought it advisable to deliver it, that there may be no unnecessary delay in having an end put to the controversy.

The first error assigned, is, that the District Court refused to permit the counsel of the defendant below to commence and conclude the argument to the jury after the testimony on both sides was closed. It has been contended, that as the only plea put in and relied on by the defendant is that of property, which is purely affirmative, he was therefore entitled to the conclusion in summing up and addressing the jury. Although in most cases where the defendant pleads merely an affirmative plea, he is, by the course of practice, entitled to the conclusion, because generally it throws upon him the *onus probandi*, yet the plea of property, as I apprehend, does not produce this effect in the action of replevin. The plaintiff, I think, must, notwithstanding, first prove that he has a right to maintain his writ of replevin, by showing that he has either an absolute or special property in himself. Co. Litt. 145; Bul. N. P. 52. In this respect the action of replevin is different from trespass, which may be supported against any one who has no right, by him who has the possession. *Waterman v. Robinson*, 5 Mass. R. 303. Hence property in a stranger is pleadable in replevin either in bar or

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in abatement. Salk. 5, 94; s. c. Ld. Raym. 984; Cro. Jac. 519; Carth. 243; 6 Mod. 69, 81, 103; 2 Lev. 92; 1 Ventr. 249; Gilb. on Rep. 127-8. So if the defendant plead property in himself in abatement, he does not thereby confess the caption, but only shows that the plaintiff hath not a right to the deliverance. Gilb. on Rep. 127. And more especially must this be so in Pennsylvania, where the action of replevin may be maintained by the plaintiff to recover the possession of goods and chattels to which he is entitled as owner in all cases, as well where the defendant came by the possession of them lawfully, and withholds it from the plaintiff unlawfully, as where he got it tortiously; and consequently the plea of property, although it be the only plea put in by the defendant, cannot be considered as an [*284] admission by him that the plaintiff ever had possession of the goods so as to give him even the colour of title, much less the right of property, to enable him to support his action. In *Clemson v. Davidson*, 5 Binn. 399, which was an action of replevin, where the defendant pleaded property, the late Chief Justice of this court says, "it is true, that notwithstanding his (the defendant's) plea, it is necessary for *Clemson* (the plaintiff) to show property in himself." Seeing, then that the burthen of proof still lies upon the plaintiff in replevin, notwithstanding that the defendant relies solely on the plea of property, I am inclined to think that the order of the court below was in conformity to the rule of practice in this particular. But had it been otherwise, I am not prepared to say that it would have been good cause for reversing the judgment upon writ of error.

The third error assigned, is, in the decision of the court below refusing to admit in evidence the exemplification of the record of the judgment rendered in the Superior Court of the city of New York, which was offered for that purpose by the plaintiff in error. This court is clearly of opinion, that it ought to have been admitted in evidence, and that the court below erred in rejecting it. It was offered in evidence by the defendant below, to show that the right or title of the plaintiff below to the logwood in question in this action, was decided against him upon the trial of a suit in the Superior Court of the city of New York, which was commenced and prosecuted therein by him against William Nott and John Parker, from whom the defendant below claimed to derive his right of property to the logwood, by means of a sale made of it by Nott and Parker as the agents of the plaintiff below.

From this exemplification of the record of the judgment of the Superior Court of the city of New York, it is manifest that the value or price of the logwood which forms the subject-matter of

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the dispute in this action, was a part of the claim of the plaintiff below in his suit against William Nott and John Parker in that court. They sold the logwood to Samuel P. Morgan & Co., who shipped it on board of the bark Hercules consigned to C. Price & Morgan at Philadelphia, who sold it again to the plaintiff in error.

Now, as the sale of logwood by Nott and Parker at New Orleans, when, as is admitted by both parties, it was the property of Sylvester Pier, and avowedly sold by them as such, are facts alleged and admitted on both sides in this action, it necessarily follows, that on the trial of the cause in the Superior Court of the city of New York, either the authority of Nott and Parker to make this sale, and that they had faithfully accounted to Pier for the proceeds thereof, must have been established to the conviction of the court and jury, or otherwise, if made without legal authority, that they had satisfied Pier for his claim and loss of property in the logwood, in some way, so that he was not entitled to recover of them in that action. And it appears to me, that being decided against Pier, on either of these grounds, he was thereby precluded from the further maintenance of *this action. In short, I am unable to perceive any [*285] ground upon which that action could have been determined, as it appears from the exemplification of the record to have been, that would not have made it a bar to the further prosecution of this suit by him. The evidence to support both actions was the same; that being so, the cause of action must be the same, notwithstanding the actions are grounded on different writs. This was held in *Kitchen v. Campbell*, 3 Wils. Rep. 308, to be the test by which we are to ascertain whether a final determination in a former action is a bar or not to a subsequent action; and it is there said, that this principle runs through all the cases in the books, both in real and personal actions. It was resolved in *Ferrers' Case*, 6 Co. 7, "That when one is barred in any action, real or personal, by judgment upon demurrer, confession, verdict, &c., he is barred as to that, or the like action of the like nature for the same thing forever," for *expedit reipublice ut sit finis litium*; which is also supported by another maxim, *nemo debet bis vexari, si constet curie quod sit pro una et eadem causa*. *Sparry's Case*, 5 Co. 61. In *Slade's Case*, 4 Co. 946, it was held, that a judgment in an action of debt was a bar to an action of *assumpsit* brought on the same contract. In *Bardwell v. Kersey et al.*, 3 Lev. 179, it was decided, that a former action of trespass by the plaintiff against the defendants was a bar to a subsequent action on the case for the same cause. Also in *Kitchen v. Campbell*, 3 Wils. 308-9; s. c. 2 Bl. Rep. 827, it was ruled, that a judgment rendered in favour of the defendant in a

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former action of trover; was a bar to the plaintiff's recovery in a subsequent action of *assumpsit* for money had and received for the plaintiff's use, from a sale made of the same goods by the defendant. In like manner a judgment rendered for the defendant in trespass *de bonis asportatis*, was determined to be a bar to the plaintiff's recovery in a subsequent action of *assumpsit* to recover the money received by the defendant as the price of the same goods upon a sale made of them by him. *Rice v. King*, 7 Johns. 20. The principle settled by these, and many other cases, is, that the plaintiff cannot have a second investigation of the same original matter when it has passed once in *rem judicatam*. And this is in conformity to the rule laid down and deduced by the judges from the cases on this subject in the *Dutchess of Kingston's Case*, 20 State Trials, 535, "that the judgment of a court of concurrent jurisdiction directly upon the point, is as a plea, a bar, or as evidence conclusive, between the same parties upon the same matter directly in question in another court."

From the same cases, as well as others, it may be seen, that the plaintiff may frequently at his election, bring either trespass, trover, replevin, detinue, or *assumpsit*, to recover compensation for the loss of his goods. *Feltham v. Tyrrel*, Lofft's Rep. 207, 320; *Lamine v. Dorrell*, 2 Ld. Raym. 1216; *Lindon v. Hooper*, Cowp. 419; 20 Vin. Abr. tit. Trespass, page 540, and the cases there referred to. And if the plaintiff elects to bring an action of trespass or trover against the defendant, who has sold his [*286] goods without authority, and obtains a judgment covering the value of the goods, the right of property in them, I take it, from the weight of the English authorities on this subject, is thereby changed from the plaintiff, so that he could not maintain an action afterwards for the goods, against the vendee of the defendant. *Brown v. Wootton*, Cro. Jac. 73, per Fenner, Justice, "the property of the goods is changed," page 74; s. c. Yelv. 67-8, and note (1), by Metcalf; Moore, 762; *Adams v. Broughton*, 2 Stran. 1078; s. c. Andr. 18; Bull. N. P. 47; 1 Crompt. Prac. 184. Per Lord Hardwicke, in *Smith v. Gibson*, Rep. Temp. Hard. 319. "It is a sale of the thing to the defendant, which vests the property in him." 3 Starkie's Ev. part 4, page 1281. So judgment for the plaintiff in replevin in the *detinet* for damages, vests the property of the goods in the defendant. *Moor v. Watts*, 1 Ld. Raym. 614; 12 Mod. 428. In New York, however, it is held, that the property of the plaintiff in the goods in such cases, is not changed, until the defendant shall have paid, or satisfied the judgment, in conformity to the rule *solutio pretii, emptionis loco habetur*, which seems to be sanctioned by what is laid down in Jenk. cent 4, case 88, page 189. *Curtis v. Groat*, 6 Johnson, 168; *Osterhout v. Roberts*,
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8 Cowen, 43. But in Virginia, in *Murrell v. Johnson's Adm.*, 1 Henning and Mun. 449, the court seemed to think, that A., whose slave had been sold without his authority, by B. to C., and by C. delivered to D., having brought an action of *detinue*, and obtained a judgment in it against C., could not afterwards maintain an action of *detinue* against D. for the same slave, notwithstanding his judgment against C. still remained unsatisfied. So if the plaintiff brings an action of *assumpsit*, instead of trover or trespass against the defendant, who has sold his goods without authority, as he may do according to many of the foregoing cases, and recovers a judgment, I apprehend that he cannot afterwards sustain an action of any kind, against the vendee of the defendant, or any person claiming the goods under him. And this not merely for the reason assigned in the cases cited above, but for an additional, and perhaps still more forcible one, which is, that by thus claiming the money arising from the sale made of the goods by the defendant, he thereby affirms it, for the money arising from the sale of the goods is all that the plaintiff can claim and recover in the action of *assumpsit*, and by taking a judgment for it, it does appear to me, that he thereby ratifies and confirms the sale made of the goods, and he shall not afterwards be permitted to gainsay it. *Omnis rati habitio retrahitur et mandato seu licentiæ equiparatur.* *Lamine v. Dorrell*, 2 Ld. Raym. 1216; *Bennitt v. Francis*, 4 Esq. Rep. 28. Accordingly, in *Brewer v. Sparrow*, 7 B. & C. 310; s. c. M. & R. 2, it was held, that a person having once affirmed the acts of another, who wrongfully sold his property, cannot afterwards treat him as a wrongdoer, and maintain trover against him. And should the plaintiff fail, on trial of the action of *assumpsit*, and have a verdict and judgment given against him, still he would be precluded thereby from maintaining another action for the same goods, involving the same evidence, and in effect, the same *cause of action, for the question, or [*287] subject-matter of dispute, having passed once *in rem* [*judicatam*], he shall not again vex the defendant or those claiming under him with a second action. *Young v. Black*, 7 Cran. 567.

Neither is it material in such cases, that both actions were commenced on the same day, or at different dates, and were both pending afterwards, at the same time, and the action last brought, tried first, and judgment rendered in it; still the plaintiff will be bound by it, and be precluded from further maintaining the action first entered, and so *vice versa*. This was the case in *Garvin v. Dawson*, 13 Serg. & Rawle, 246, where the second action between the parties commenced about one month after the first was tried, and a judgment rendered in it in favour of the defendant, which was afterwards held to be a bar to the

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plaintiff's further maintenance of his first action. This is according to the rule, *nemo bis vexari debet*, which allows to every one the opportunity of having his complaint fairly investigated, and fully heard before the judicial tribunals of the state, but being once decided by the proper court, after such investigation and hearing, the peace and quiet of the community require that there should be an end of the dispute. If we disregard this rule we have no other, and every controversy must become interminable.

From the views which I have taken of this part of the case, it appears to me, that the exemplification of the record of the Superior Court of the city of New York, was not only pertinent to the issue joined, and therefore admissible, but would have been conclusive evidence against the plaintiff's right of property to the logwood, had it been received, unless he had shown that the logwood for which he made a claim in that action, was not the same claimed in this, or that he had on the trial of that, withdrawn that part of his claim which consisted of the logwood. The defendant below in this action, pleaded property in the logwood, and the judgment of the Superior Court of the city of New York, showing that the plaintiff had been divested of his right to it, by a sale made thereof, under which the defendant below in this action, claims to derive his right, established greatly the most important link in the chain of his title. And although the judgment of the Superior Court of the city of New York was rendered during the pendency of this action still I think it was not necessary to plead it, in order to make it admissible evidence, because it was, in effect, the decision of a competent court of concurrent jurisdiction, given in affirmance of the sale of the logwood, mentioned in the record of the judgment made by the defendants therein named, before the commencement of this action, under which the defendant here claims a right to the logwood. Neither do I conceive that it was necessary to plead it, in order to make it conclusively binding upon the jury against the plaintiff below; for if it was properly admissible under the plea of property, of which I entertain no doubt, as it went directly to establish the validity of the sale of the logwood, under which the defendant below

[*288] claimed it, it being the judgment of a competent *court, must be considered the conclusion or sentence of the law on the facts of the case, and therefore not to be set aside, reversed, or disregarded, by either court or jury in this action. This doctrine, as I conceive, is not inconsistent with the rule laid down by a majority of this court, in *Kilheffer v. Herr*, 17 Serg. & Rawle, 322, but comes within the qualification there mentioned, but wherever the party is not bound to plead speci-

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ally to enable him to give the record of a former recovery in evidence, it will, when given, in evidence, although not pleaded, be conclusive and binding upon the plaintiff, the court, and the jury. 1 Phil. Ev. 223-4, (New York, 1816.) Where a subject or question in controversy has been once settled by the judgment of a competent tribunal, it never ought to be permitted to be made the ground of a second suit between the same parties, or those claiming under them, as long as the judgment in the first suit remains unreversed. The peace of the community is a great *desideratum*, and nothing ought to be tolerated, that would disturb it unnecessarily. Before the rendition of a judgment, the court is presumed to be made acquainted by one or the other, or by both of the parties, with everything that is necessary to be known, in order to procure a correct decision upon the case; so that the judgment of the court not being pronounced until after it has been so informed, must be taken and considered as corresponding and answering fully to the claims of justice. It is therefore altogether inadmissible to say, that a renewal of the contest shall or ought to be permitted, because the first decision was not just or right.

The propriety of those decisions which have admitted a judgment in a former suit, to be given in evidence to the jury on the trial of a second suit for the same cause, between the same parties or those claiming under them, but at the same time have held that the jury were not absolutely bound by such judgment because it was not pleaded, may well be questioned. The maxim, *nemo debet bis vexari, si constet curiæ quod sit pro una et eadem causa*, being considered, as doubtless it was, established for the protection and benefit of the party, that he may therefore wave it; and unquestionably, so far as he is individually concerned, there can be no rational objection to his doing so. But then it ought to be recollected, that the community has also an equal interest and concern in the matter, on account of its peace and quiet, which ought not to be disturbed at the will and pleasure of every individual, in order to gratify vindictive and litigious feelings. Hence, it would seem to follow, that wherever on the trial of a cause, from the state of the pleadings in it, the record of a judgment rendered by a competent tribunal upon the merits in a former action for the same cause, between the same parties or those claiming under them, is properly given in evidence to the jury, that it ought to be considered conclusively binding on both court and jury, and to preclude all further inquiry in the cause; otherwise the rule or maxim, *expedit reipublicæ ut sit finis litium*, which is as old as the law itself, and a part of it, will be exploded and entirely disregarded.

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[*289] *But if it be part of our law, as seems to be admitted by all that it is, it appears to me that the court and jury are clearly bound by it, and not at liberty to find against such former judgment. A contrary doctrine, as it seems to me, subjects the public peace and quiet, to the will or neglect of individuals, and prefers the gratification of a litigious disposition on the part of suitors, to the preservation of the public tranquility and happiness. The result, among other things, would be, that the tribunals of the state, would be bound to give their time and attention to the trial of new actions, for the same causes, tried once or oftener, in former actions between the same parties or privies, without any limitation, other than the will of the parties litigant, to the great delay and injury, if not exclusion occasionally of other causes, which never have passed *in rem judicatam*. The effect of a judgment of a court having jurisdiction over the subject-matter of controversy between the parties, even as an estoppel, is very different from an estoppel arising from the act of the party himself, in making a deed of indenture, &c., which may, or may not be enforced at the election of the other party; because, whatever the parties have done by compact, they may undo by the same means. But a judgment of a proper court, being the sentence or conclusion of the law, upon the facts contained within the record, puts an end to all further litigation on account of the same matter, and becomes the law of the case, which cannot be changed or altered, even by the consent of the parties, and is not only binding upon them, but upon the courts and juries ever afterwards, as long as it shall remain in force and unreversed.

The fourth error is, that the court below refused to admit in evidence the exemplification, in connection with the bill of particulars already set out *verbatim*. That the exemplification was admissible, has been shown; but if it had not been admissible of itself, it is not easy to conceive how this writing, called "a bill of particulars," would have made it so. Indeed, without any proof having been given, or even offered, to show that this bill of particulars was made, and came from the plaintiff, Sylvester Pier, or from his attorney or his counsel, to William Nott, the defendant in the action, set forth in the exemplification, or to his attorney or counsel, before the trial of that action, in short, to show that it was genuine, and what it purported to be on its face, I am at a loss to conjecture upon what ground the counsel offering it in evidence, could have imagined that it was admissible, either conjunctively or separately. If such evidence, however, as I have mentioned, of its having come from the plaintiff, his attorney or counsel, to the defendant in the action set forth in the exemplification, his attorney or counsel, before the trial

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of it, had been first given, or the court had refused to receive it when offered, it would have been error in the court below, not to have received such preliminary testimony, and, after that, not to have received the bill of particulars itself in evidence, after the exemplification had been first read in evidence, or not to have admitted it in connection with the exemplification. But without such preliminary proof being made, it was clearly not admissible; *after it, it was, because it would have shown to demon- [*290]stration, that the cause of action, so far as it consisted of a claim for and on account of the logwood in the suit tried in the Superior Court of the city of New York, was identically the same with the cause of action in this case. The court below were right in rejecting the bill of particulars, as no proof was offered to show that it was genuine, and what it purported to be.

The eighth and last error is, that the verdict is general for the plaintiff, giving the amount of damages, which the jury conceived the plaintiff was entitled to recover, without finding the value of the goods *eo nomine*, and damages separately besides for their detention, so that the judgment might have been rendered accordingly and for a return irrepleviable. Where the defendant in replevin claims property in the goods for which the writ is sued out, and gives bail to the sheriff, as was done in this case, the sheriff cannot replevy them. He is bound to take the bail, if good, and to leave the goods in the possession of the defendant. The plaintiff must, therefore, count in the *detinet*, as the goods are not delivered to him, and, if he succeeds on the trial in establishing his right of property to the goods, he "shall have judgment to recover all in damages, as well as the value of the goods as damages for the taking of them and his costs." F. N. B. 69, L. and the cases referred to in note (c) 9th ed. Dublin, 1793. No judgment for a return of the goods is given in such case, but for damages equal in amount to the value of them, as a compensation for their loss, and the property in the goods is thereby transferred, as I have already said in another part of this case, to the defendant. The judgment rendered in this case is in the usual form. *Gilb. on Replev.* 125-6. *Easton v. Worthington*, 5 Serg. & Rawle, 131; *Hosack v. Weaver*, 1 Yeates, 478; *Hardy v. Metzgar*, 2 Yeates, 347. In those two last cases, the judgment in each was rendered in the same form in favour of the plaintiff, upon the plea of property, as in this. There is, therefore, no error in the form of entering the judgment here, but it must be reversed for the third error assigned.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 1 Wh. 8; 2 Wh. 413; 3 Wh. 398; 4 Wh. 37; 5 Wh. 491; 6 W. 349; 7 W. 162, 196; 8 W. 412; 9 W. 570; 10 W. 226; 1 W. & S. 525; 3 W. & S. 142, 168; 5 W. & S. 560; 1 Barr, 252; 2 Barr, 30; 3 Barr,

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296; 7 Barr, 376; 8 Barr, 299; 9 Barr, 66; 1 J. 222, 267; 1 H. 366; 5 H. 413; 6 H. 450; 8 H. 23, 417; 12 H. 244; 7 C. 382; 8 C. 199, 469; 10 C 51; 11 C. 311, 435; 12 C. 394, 456; 1 G. 118; 6 Wr. 408; 9 Wr. 19; 3 S. 196, 226; 5 S. 176; 7 S. 448; 8 S. 368; 17 S. 164; 18 S. 22; 20 S. 49; 28 S. 80; 29 S. 219, s. c. 2 W. N. C. 376; 31 S. 382; 32 S. 68; 5 N. 53; 2 O. 181, 455; 3 W. N. C. 446; 11 W. N. C. 382.

Cited by the Court, 3 W. & S. 107; 5 W. & S. 17; 2 Barr, 206; 3 Barr, 21, 49; 7 Barr, 417; 10 Barr, 34; 1 J. 49; 6 C. 194, 230; 3 S. 227; 24 S. 309; 2 O. 278, s. c. 10 W. N. C. 567; 5 W. N. C. 142.

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*[PHILADELPHIA, MARCH 29, 1833.]

Hough against Doyle.

IN ERROR.

A mutilated piece of paper, which appears to have been torn out of a book, in which the name neither of the plaintiff nor defendant appears, which contains no charges against the defendant, and which is unintelligible without explanation by the plaintiff, is not admissible in evidence, as a book of original entries.

The act of an agent does not bind his principal, unless it be proved that it was done during the agency, and was within the scope of his authority.

How far the acts and declarations of an agent bind his principal.

THE record of this case being returned on a writ of error from the Court of Common Pleas of *Northampton* county, accompanied by two bills of exceptions to evidence, it appeared that it came before the court below, on an appeal from a justice of the peace, before whom an action was brought by John Doyle, the plaintiff below and defendant in error, against Joseph Hough, for work and labour done by the former for the latter, on a canal.

On the trial in the Court of Common Pleas, the plaintiff was sworn in support of what he produced on his book of original entries, and testified that it was his account of work done on the canal, for Joseph Hough; that he kept an account of it as he worked, and that what he produced exhibited his original entries of his transactions with Hough. On his cross-examination, he stated, that the paper was in his handwriting; that it was the first place in which he entered his work, which he never set down upon a slate; that it was never three days from the time he did the work until he set it down; that he could not tell what had become of the rest of the book; it might be at home; that he had a book, but could not tell how much there was of it; that there was none of it of use but what was produced, and he could not tell when that was torn out.

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His counsel then offered in evidence the paper referred to, which was part of a loose sheet, which had some appearance of having been torn out of a book. It is impossible accurately to describe this paper, but its character may be understood from the objections made by the counsel for the defendant below, to its being admitted in evidence. They were as follows :

1. That it is not a book of original entries.

2. That neither the plaintiff's nor defendant's name is in it, nor any charges against the defendant ; that it is unintelligible without explanation, which the plaintiff is incompetent to give.

3. That it is mutilated, and not the entire book, and shows nothing in support of the issue.

The court admitted the evidence, observing that any imperfections *in it, were matters for the jury, in determining [*292] the credit to be given to it.

To this opinion, exception was taken by the counsel for the defendant.

The plaintiff then produced a witness, who testified, that he knew that Doyle had worked on Hough's job, but he could not say how long ; he was there a considerable time ; that he saw Horace Egelston there ; he hired and paid the witness ; he attended to the hands, and went round to see that the work was done as it ought to be done ; that Silas Hough was not there at the first offstart ; Joseph Hough might have been there at the first, off and on, but was not there regularly. On his cross-examination he said, that Silas Hough did not commence until the store commenced ; he was clerk in the store ; Egelston employed the hands in the offstart ; he was chief employer of hands ; when he was not there, Silas Hough employed hands sometimes ; the witness had known Egelston to discharge hands ; the concern was under Egelston's management, at least the witness considered it so ; Joseph Hough was not there constantly ; the witness saw him there off and on ; John Doyle worked at blacksmithing ; the latter part of the time he worked there, his family lived in a house there. The witness then proved the handwriting of Horace Egelston, to a paper produced and offered in evidence by the plaintiff's counsel, which was in these words :

"Take the season from the commencement to the first of April 16 dollars per month and then for three months or until the job is finished 19.50 cents per month and when your family comes we will allow you 1.75 cents per week for board."

"H. EGELSTON."

The admission of this paper was objected to by the counsel for the defendant for the following reasons :

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1. That Egelston was not proved to have been the defendant's agent; that the paper was not proved to have been given during the alleged agency, or to have been within the scope of his authority.

2. That it was without date, and mentioned neither the name of the plaintiff nor of the defendant, nor any other matters showing its connection with the subject in dispute.

3. That Egelston himself should have been produced, or his absence accounted for.

The court overruled the objections, and admitted the evidence, and exception was again taken to their opinion.

J. M. Porter, for the plaintiff in error.

1. The paper admitted by the court below as a book of original entries, had not that character upon its face, and could be shown to be such a book only by the oath of the plaintiff, which was incompetent. The distinctive character of the evidence as [*293] a book of original *entries must first be shown to the court, and if it possess that character, the jury are to decide upon its errors and imperfections, but here the court submitted to the jury the determination of a question which belonged to itself. There is no case to support the admissibility of an entry which upon its face does not import a charge, and which can have that effect given to it only by the explanation of the party himself. Unconnected scraps of paper are not evidence. *Thompson v. M'Kelvey*, 13 Serg. & Rawle, 127. Here is a mere scrap, more like a check roll than anything else, charging no one, containing no name, and which is sworn not to contain the whole account, but to be part of a book, of which the remainder may perhaps be at home, but which the party undertakes to say is all that is of any use. If a party is to be allowed to give his own explanations, and by them apply his charges to the defendant, he may, by the same process, make every individual in the country his debtor. *Poultney v. Ross*, 1 Dall. 238; *Ducoign v. Schreppel*, 1 Yeates, 347; •*Wilmer v. Israel*, 1 Browne, 257; *Summers v. M'Kim*, 12 Serg. & Rawle, 411; *Kelly v. Holdship*, 1 Browne, 36; *Prime v. Smith*, 4 Mass. R. 455.

2. There was no evidence that Egelston was the agent of Hough. For ought that appears, Hough may have underlet the contract, and Egelston may have been working on his own account. If Egelston was the agent of Hough, it ought to have been shown that the paper offered in evidence was given during the agency, and that it was within the scope of his power to give it; yet there is nothing to show when, how, or why it was given. It is without date, is directed to no one, and is not

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signed by Egelston as agent of Hough or of any one else. Supposing Egelston to have been the agent of Hough, the paper to have been signed by him during the agency, and to refer to the plaintiff, of which there was no proof, it is nothing more than the declaration of the agent beyond the limits of his power, and does not bind the principal. *Lessee of Cluggage v. Swan*, 4 Binn. 150; *Cutbush v. Gilbert*, 4 Serg. & Rawle, 556; *Hubbel v. Elmes*, 7 Wendell, 446; *Blight v. Astly*, 1 Peters, C. C. R. 15; *Shelhamer v. Thomas*, 7 Serg. & Rawle, 109; *Magill v. Kauffman*, 4 Serg. & Rawle, 321; *Roscoe on Evid.* 29.

Brooke, for the defendant in error.—1. Upon the evidence there was no doubt that Doyle worked as a blacksmith upon the contract of Hough. The book was therefore evidence to show how long he had worked, and it was properly submitted to the jury with instructions to decide upon its imperfections. It was not the case of a man keeping a book with various persons, but an account of time with a single individual. The necessity of the case is the foundation of the rule on which such evidence is admitted, and a stricter rule ought not to be applied to an illiterate labourer than to a merchant. The necessity which regulates this sort of evidence has relation to the nature of the business in which the party is engaged, and also to his capacity to keep regular books. If a claim like that of the plaintiff below *cannot be proved in the manner proposed, it must be [*294] lost, for it can be proved in no other way. A labourer cannot call upon others to prove how long he worked, and an account of such work cannot be kept in a more satisfactory mode than this, which is the one universally adopted by those who are engaged in that line of business. In the case of *Curren v. Crawford*, 4 Serg. & Rawle, 3, no one could understand the entries without explanation, and upon the principle of that case, of *Sterrett v. Bull*, 3 Binn. 237, and of *Kaughley v. Brewer*, 16 Serg. & Rawle, 131, the evidence in question was admissible.

2. All the circumstances of the case showed the agency of Egelston. The evidence of it was submitted to the jury, and if they thought the agency not proved, they, of course, would have given no weight to the paper. If it was proved, the paper bound the principal, as it was immediately connected with the business of the agency.

The opinion of the court was delivered by

ROGERS, J.—The plaintiff in error has assigned several reasons, any one of which is sufficient, against the admission of the paper, purporting to be a book of original entries: That it is not a book of original entries: That neither the plaintiff nor

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defendant's name appears on the paper, nor any charges against the defendant: That it is unintelligible without explanation, which the plaintiff is incompetent to give, and that it is mutilated, and is not the entire book.

We are further of opinion, that the court were in error in admitting the paper signed H. Egelston; because, granting Egelston to have been the defendant's agent, yet there was no proof that the paper was given during the agency, or that it was within the scope of his authority. The paper is without date, and mentions neither the name of the plaintiff nor defendant, nor is there anything in proof which shows that it has any connection with the matter in controversy.

The general rule is this: When it is proved that one is the agent of another, whatever the agent does, or says, or writes, in the making of a contract, as agent, is admissible in evidence against the principal, because it is part of the contract which he makes for his principal, and which, therefore binds him, but it is not admissible as the agent's account of what passes. For example, the declaration of a servant, employed to sell a horse, is evidence to charge the master with warranty, if made at the time of sale; if made at any other time, the facts must be proved by the servant himself. The admissions of an agent, not made at the time of the transaction, but subsequently, are not evidence. Thus, the letters of an agent to his principal, containing a narrative of the transaction, in which he had been employed, are not admissible in evidence against the principal. *Vide* Roscoe on Evidence, 29, in note, and the authorities there cited.

Judgment reversed, and a *venire de novo* awarded.

Cited by Counsel, 2 Wh. 342, 413; 3 W. & S. 86; 5 W. & S. 365; 8 W. 545; 10 W. 249; 1 C. 394; 6 C. 245; 7 S. 423; 9 S. 413; 10 S. 171; 23 S. 78; 5 N. 521; 6 O. 133; 3 W. N. C. 505; 11 W. N. C. 114; 12 W. N. C. 74.

Cited by the Court, 6 W. & S. 290; 7 S. 343; 1 N. 123.

Approved and followed, 21 S. 555.

Statements by an agent of a company soon after an accident, that the servants of the company were incompetent, or that the apparatus of the company was bad, are inadmissible, 1 N. 123; 6 O. 131.

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Smith *against* Buckecker and Wife.

IN ERROR.

In an action of slander for calling the plaintiff a whore, the defendant cannot, under the plea of not guilty with leave to give the special matter in evidence, give evidence to prove that the plaintiff was a reputed thief before the time at which it was proved that he had spoken the words.

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Nor can the defendant be permitted to prove, that before the time at which he had spoken the words, it was reported, that the plaintiff had been accused by her sisters of having had connection with J. H.

ERROR to the Court of Common Pleas, of *Northampton* county.

After argument by *Scott*, for the plaintiff in error, and *J. M. Porter*, for the defendant in error, the opinion of the court, in which the case is fully stated, was delivered by

KENNEDY, J.—This action has been brought into this court by writ of error to the judges of the Court of Common Pleas of *Northampton* county, where it was commenced by the defendants in error, against the plaintiff in error, for defamatory words spoken by him of Rebecca Buckecker, one of the defendants in error. There are six counts in the declaration. The words in the two first are that “she whored with John Huff;” in the third and fourth, that “she had whored with Doctor Stout;” in the fifth, “you are a whore,” and in the sixth, “she is a whore.”

The defendant below pleaded first, the general issue, with leave to give the special matter in evidence; afterwards, he added the plea of justification to the first and second counts; and ten or more days before the time of trial, according to a rule of the court below, gave the plaintiffs there a notice of special matter in the following words, to wit:

“Sir—You will please take notice that I have this day added the plea of justification to the first and second counts of the plaintiff’s declaration, and that under the pleas entered, defendant, in mitigation of damages, will offer evidence to prove the general character of the plaintiff, Rebecca Buckecker, late Lynn; in substance, amounting to this, that she is dishonest, and a reputed thief; that she is lewd in her manners, and a reputed whore.”

On the trial of the cause, after the plaintiffs below had given evidence of the speaking, by the defendant, of the words charged in the declaration, he offered, *inter alia*, to give evidence that Rebecca, one of the plaintiffs, was reputed a thief before the time at which it was proved that he had spoken the words. This evidence was objected to by the plaintiffs’ counsel, and overruled by the court. *Defendant’s counsel excepted [*296] to the opinion of the court in this behalf, which is assigned for the first error.

The defendant further offered to give evidence, that it was reported before the time, at which, according to the evidence given, he spoke the words, that the said Rebecca was accused by her sisters of having connection with black John Huff, to which the plaintiffs’ counsel also objected, and the court over-

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ruled the evidence. To this opinion of the court, the defendant's counsel excepted, and has made it the ground of the second error, which, with the first, are all that have been assigned, and now remained to be considered.

It is not claimed by the counsel for the plaintiff in error, that any portion of the evidence rejected by the court below ought to have been admitted under the plea of justification, but it is contended strenuously that under the plea of not guilty with leave to give the special matter in evidence, the whole of it ought to have been received.

With respect to the evidence to which the first error relates, it is said, that every plaintiff who prosecutes an action for defamation, puts his general character in issue, and that it therefore becomes competent for the defendant to show that his general character is bad, in any and every point of view whatever, and totally destitute of any and all the virtues necessary to constitute a good moral character. These are propositions to which I am not prepared to give my assent fully. It was at one time held in England, that where the defendant pleaded the general issue without a justification, he might prove that the plaintiff had been generally suspected of the offence imputed to him by the defendant. *Earl of Leicester v. Walter*, 2 Camp. 251; — *v. Moore*, 1 Maule & S. 284; 2 Stark. Evi. 877. But it seems to be settled now, that the plaintiff cannot give evidence of his general good character with a view to enhance the damages. *Stuart v. Lovell*, 2 Starkie's Ca. 84; *Cornwall v. Richardson*, R. & M. 305. Nor can the defendant, on the other hand, show that it is bad in mitigation of damages. *Jones v. Stevens*, 11 Price, 235. During a certain period, however, it was held, that the defendant under the general issue might assail the general character of the plaintiff, and give evidence that it was bad; and as long as this was the rule, the plaintiff was, of course, admitted to repel it by giving evidence of his general good character; but it was only in cases where his general character was first impeached by the defendant, that he was permitted to give evidence of its being good, for that was always presumed, until some attempt, at least, was made to rebut it. 2 Stark. Ev. 370-1, 878.

Under the application of the rule which seems to prevail at present in England, it is clear, that the evidence referred to in the first bill of exceptions was not admissible, which was to show that Rebecca, one of the plaintiffs below, was reputed a thief. It is very evident, that evidence to prove the fact of her being a thief, could not have been received either in bar of the action, [297] nor yet in mitigation of *damages, because altogether foreign to the issues joined as well as to the charge

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made by the defendant upon the character of the plaintiff. *Hilsden v. Mercer*, Cro. Jac. 677; *Andrews v. Vanduzer*, 11 Johns. 38; *Sawyer v. Eifert*, 2 Nott & M'Cord, 511. But it is contended, that although it was not competent to prove the fact of her being a thief, still evidence of her being reputed such was admissible, as showing that her general character was not good.

It appears to me that this is claiming too great a latitude, and an indulgence that should not be extended to a slanderer. It is going far enough in such cases, to permit a defendant who cannot justify, to prove in general terms that the general character of the plaintiff is not good, without permitting him to prove that the plaintiff has been suspected or reputed to be guilty of a crime or crimes different from that imputed and set forth in the declaration.

Such evidence could not in the least extenuate the offence of the defendant below. On the contrary, does it not seem to be rather an aggravation of it? Is it not in effect saying, "It is true I have charged you with being a whore, and although false and entirely groundless, yet I am determined not to be altogether frustrated in my design of destroying your character, and will therefore prove now, not that you are a thief, for that I am unable to do, but that you have been at least reputed such?" This, as it appears to me, would be permitting the defendant to give utterance to another slander, for the purpose, as he says, of palliating the first, when, as likely as not, he may be the author of both; for although it may have received a circulation that has attached, in some degree, to the general character of the party, still it was no doubt originally the offspring of a single tongue, but whose, it may be impossible to identify, on account of the confusion produced by its general circulation. I am therefore unwilling to sanction a principle, which may enable a man to offer one slander, which he may have been the author of as likely as anybody else, as an extenuation of the second.

Whether, under the plea of not guilty with leave to give the special matter in evidence, he ought to be permitted to give evidence of circumstances which had induced a suspicion of the plaintiff's guilt, in order to mitigate the damages, without at the same time showing the plaintiff's innocence and acquitting him of all suspicion; or whether he ought to be permitted with the like view to give evidence that he was told the slander by another, without having mentioned his author at the time he spoke the words; or whether the defendant shall be at liberty to give evidence of the plaintiff's general character being bad, simply, without more, are questions which do not necessarily

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arise in this case, and upon which I therefore forbear to express an opinion. But I am most decidedly of opinion, that he ought not to be permitted to go one jot beyond the affirmative answer to each of the foregoing questions, if so far.

It is also proper to observe, that the evidence connected with this first error assigned, was not evidence to show that the [*298] plaintiff was *generally reputed a thief, but barely to prove that she was reputed, that is, accounted such, which might have been only by one or two persons; so that the evidence rejected by the court below, was not such as could have incorporated the charge of thief into her general character. Upon every principle, therefore, the court were right in rejecting it.

The second error assigned is, that the court below rejected the evidence offered by the plaintiff in error, which was to prove that it was reported that Rebecca Buckecker, one of the defendants in error, was accused by her sisters of having had connection with black John Huff. It does appear to me, that it was carrying the matter too far, to say that there was error in rejecting this evidence, and gravely to present to the court a bill of exception on account of it. The offer, it will be observed, was not to give evidence that any one had ever said that she had had connection with Huff, but that it was reported, that her sisters had accused her of it. I confess that I am unable to see how such a report could in the least palliate the conduct of the plaintiff in error, or lessen the nature of the injury. It is not even pretended, or at least no evidence was offered to show, that the sisters ever made such an accusation, but merely that a report had some how or other got into circulation to that effect; which might, for aught that was offered to be shown, have originated with and started from the plaintiff in error himself. A man who would take advantage of such a report being in circulation, although he had no concern in originating it, and make it the basis of charging the female directly with the offence, as was done in this case, ought certainly not to be punished the less severely on account of it.

Beside, there was another objection to the receiving of this evidence, which I think was insuperable. It was not contained within the notice of special matter which was given, and according to the rule of the court below, could not be admitted after objection by the adverse party. We think the court below decided correctly in rejecting the evidence, and therefore affirm the judgment.

Judgment affirmed.

Cited by Counsel, 2 Wh. 324; 3 S. 420.
Cited by the Court, 3 S. 346.

*[PHILADELPHIA, MARCH 29, 1833.]

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Young *against* Shook.

IN ERROR.

Under a submission of all matters in variance between the parties, arbitrators have a right to make an award as to costs, though nothing be said about them in the submission.

* In an action against a surviving obligor in a joint and several bond, it is not a good cause of demurrer to a plea of submission and award, that the parties to the submission were not only the parties to the action upon the bond, in which the plea is pleaded, but that one of the executors (erroneously called in the plea one of the administrators) of the deceased obligor, also joined in the submission.

Under a submission of all matters in variance between the parties, involving the question whether a certain bond had been paid an award, not under seal, discharging the bond, is good.

Where, in an action on a bond the defendant pleaded specially, that "all matters in variance between the parties" had been submitted to arbitrators, without any averment or allegation that the bond was the matter in variance, or formed any part of it, but the plea stated that the arbitrators made their award "of and concerning the premises and of and concerning the said writing obligatory," held, that it appeared upon the face of the plea, that the arbitrators had exceeded their power in passing on matters not submitted to them, and that the award was in this respect void; and that this defect in the plea might be taken advantage of by the plaintiff, either by replying *nul agard fait*, by pleading specially, or by demurrer.

ERROR to the Court of Common Pleas of *Northampton* county, in an action of debt brought by John Young, the plaintiff in error, against John Shook, the defendant in error, surviving obligor in a bill obligatory, executed by himself and John Kemmerer, on the 12th of June, 1811, by which they bound themselves to pay to Young, two hundred and thirty-two pounds and thirteen shillings, on the twelfth day of June next following the date of the instrument. Kemmerer died before suit was brought.

The defendant pleaded payment with leave, &c., and afterwards added the following special plea :

"And the said Jacob Shook, for further plea in this behalf, by leave of the court here first had and obtained, according to the form of the statute in such case made and provided, says, that the said John Young ought not to have or maintain his aforesaid action thereof against him, because he says, that after the making of the said writing obligatory, and before the commencement of this suit, to wit, on the eighth day of March, in the year of our Lord one thousand eight hundred and twenty-seven, at the county aforesaid, the said John Young, and the said Jacob Shook, in conjunction with a certain David Kemmerer, who is one of the administrators of all and singular the goods,

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chattels, and credits which were of the aforesaid John Kemmerer, deceased, who was in his life co-obligor with the aforesaid Jacob Shook, in the said writing obligatory—submitted themselves and [*300] all matters in variance between the said parties, *that is to say, by their certain submission in writing, under their hands and seals, bearing date the day and year aforesaid, to the arbitration of Lewis Micke, Daniel Brown, and Adam Shug, as referees indifferently chosen by the said John Young, David Kemmerer, and Jacob Shook, to settle all matters in variance between the said parties, to meet at the house of George Messinger, innkeeper, of Forks township, on the seventeenth day of March, then instant. And the said Jacob Shook further says, that the said referees afterwards, to wit, on the said seventeenth day of March, in the year last aforesaid, took upon themselves the burden of the said arbitration, and having met on the day and place before mentioned, and having heard the parties, their proofs and allegations, and examined the vouchers, and duly considered the matters in dispute between the said John Young and Jacob Shook, did make their award in writing, under their hands, of and concerning the premises, and of and concerning the said writing obligatory, in the declaration mentioned, and ready to be delivered to the said parties in difference. And did thereby, then and there, award and find that the said John Young has no cause of action; and that the parties should pay the costs, each one-half, as by the said award bearing date the day and year last aforesaid, reference being thereunto had, will more fully appear. And this the said Jacob Shook is ready to verify. Wherefore he prays judgment, if the said John Young ought to have and maintain his aforesaid action against him.”

The plaintiff craved oyer of the submission and award, which was granted in *hac verba*:

“John Young *vs.* David Kammerer, one of the executors of his father, J. Ke and Jacob Shook.

“Amicable suit and agreed by the partice and refeart to Lewis Micke, Daniel Brown, and Adam Shuge, as referees chosen by the Partice to satle all matters in variance between the said partice, submitted to you to meed at the House of George Messinger, Innkeeper of Forks Township, on the 17th day of March instance. So agreed the 8th day of March, A. D. 1827, as witness our Hands and Seals the day and year aforesaid.

“JOHN YOUNG,	[L. S.]
“DAVID KEMMERER,	[L. S.]
“JACOB SHOOK,	[L. S.]

“We, the above named referees, having meed on the day

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above appointed, and after hearing the partice and there proof and allecations, and examined the voudshers, and after consiteration we find no case of action—and we fourther report that the partice shall pay the costs—Each one-half. Witness our hand this 17th day of March, Anno Domini, 1827.

“LEWIS MICKE,
“DANIEL BROWN,
“ADAM SHUGE.”

*The plaintiff demurred to the special plea, and as- [*301]
signed the following causes of demurrer, viz.:

“That the award therein referred to, exceeds the submission in determining the question of costs, which was not warranted by the submission and agreement of the parties thereto.”

“That the agreement, and, in the said second plea, supposed submission, is uot a reference at common law, but an amicable action instituted before a justice of the peace, and by an agreement of the parties thereto referred, and that the report of the referees is a nullity, no judgment having been rendered upon it.

“That in the said supposed submission in the said plea contained, there is a misjoinder of the parties to the action, and whether it be considered a reference at common law, or an amicable action before the justice, it is equally void, because no action could be sustained upon the award, and no judgment could be rendered thereon by the justice.

“That the said supposed submission in the said plea contained, is by John Young, David Kemmerer, and Jacob Shook, who are not the parties to the present suit.

“That in the title to the said supposed submission, in the said plea contained, David Kemmerer is represented as one of the executors of his father, J. K., whereas David Kemmerer is not executor of his father's estate, but administrator with Nicholas Kemmerer, who is no party to the said supposed submission.

“That by the said supposed submission an amicable suit was instituted before a justice of the peace, by the parties thereto, and the sum in controversy having exceeded one hundred dollars, it could not be submitted to referees, and an award thus made is neither a good award under an act of assembly nor at common law.”

“That the said supposed submission in the said second plea mentioned, is not truly recited, and also, that the said plea is, in other respects, uncertain, informal, and insufficient.”

The court below gave judgment for the defendants on the demurrer.

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Scott, for the plaintiff in error, cited *Alley*, 5; *Clapcott v. Davy*, 1 *Ld. Raym.* 612; *Bacon v. Dubarry*, 1 *Salk.* 70; 1 *Rolle's Ab.* 245, l. 20, 246, l. 20, 264, l. 30; *Blake's Case*, 6 *Co. R.* 43; *Beltzhoover v. Dorrage*, 16 *Serg. & Rawle*, 329.

Brooke and *J. M. Porter*, for the defendant in error, cited *Cald. on Arb.* 16, 123, 124, 126; 1 *Saund. on Pl. and Ev.* 214, 226; 2 *Chitty's Pl.* 120; *Peale v. Warner*, 1 *Saund. R.* 324; *Diblee v. Best*, 11 *John. R.* 103; *Armstrong v. Masten*, *Ib.* 189; *Kyd on Awards*, 10; 2 *Atk. R.* 505; 1 *Phill. Ev.* 305.

The opinion of the court was delivered by

KENNEDY, J.—The only question about which there is any [*302] difficulty *in this case is, whether the submission and award pleaded by the defendant, are shown thereby to have embraced the bond upon which the plaintiff has brought this action.

A number of reasons have been set forth by the plaintiff as causes for his demurrer to the plea, but there is nothing in any of them. The most of them consist of matters of fact *de-hors* the record, upon which we can predicate nothing, as they are entirely foreign to and out of the case. Such as, that the submission was of a suit pending before a justice of the peace. Now that does not appear to be the case, from the terms of the submission as set out, nor from the plea, nor any other part of the record. *Nihil habet forum ex scena.*

As to the exception, that the arbitrators exceeded the submission in awarding as to the payment of the costs, I do not consider it tenable. The submission of all matters in variance between the parties, was general, and the arbitrators under it, although there was no mention of the costs therein, had, as I conceive, a right to award as to them. *Strang v. Ferguson*, 14 *Johns.* 161.

As to the exception, that there was a misjoinder of parties to the submission, and that the parties were not the same there with the parties to this suit, there is nothing very irregular in it, or more than might have been expected where, as in this case, the parties interested in matters about which they disputed, amicably, without the aid of counsel, agreed to submit all matters in variance between them, to the arbitrament of men mutually chosen by them for that purpose. Assuming as a fact, however, for the sake of the argument, that the bond in suit was the matter in variance which was submitted and arbitrated upon, there was certainly none made parties to the submission and reference, who were not directly interested in having the matter adjusted and settled. The bond is joint and

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several, and if it had not been paid, or discharged in some way, the estate of John Kemmerer, the deceased obligor, is liable for the payment of it, as well as Jacob Shook, the surviving obligor, against whom this suit is brought. In the submission then, there is John Young, the plaintiff in this action, of the one side, and Jacob Shook, the defendant, joined by David Kemmerer, one of the executors, but said to be administrator, and not executor of the deceased obligor, of the other side. If David Kemmerer, designating himself as the executor or administrator, and it is immaterial which for such purpose, of John Kemmerer, the deceased obligor, chose to join himself with Jacob Shook, the surviving obligor, in submitting the dispute which had arisen upon the bond, to judges of their own choosing, and to make himself jointly responsible with Jacob Shook for the result, I can perceive no legal objection to his doing so, nor can I conceive how it is possible it should avoid, or render the award a nullity, because he did do so. Neither was it necessary that all the administrators of the deceased obligor should have joined in the submission, or been consulted, in order to make it conclusive. See *Morris v. Creach*, 1 Lev. *292. If the same obligation that is sued on [*303] here, was really the matter in contest, and submitted to the arbitrators, there were certainly no other parties to the arbitration, than those who were interested in the bond, and whose duty it was to have it settled; and it is unreasonable to say, that the same form must be observed in making parties to the submission, that might be necessary in bringing a suit on the bond in court, otherwise the award of the arbitrators shall be of no efficacy.

It is further contended, upon the principles laid down in *Blake's Case*, 6 Co. 44, that the arbitrament which is not under the seals of the arbitrators, cannot discharge the bond. *Ut unumquodque dissolvi eo ligamine quo ligatum est*. Although it has been said that arbitrament generally is not a good plea to debt upon a bond, yet it has been ruled that upon a submission of all matters in controversy, which included a bond, (and here it is of all matters in variance, which is the same,) an award declaring that the bond should be discharged, was a good plea. *Morris*, executor of *Adams v. Creach*, 2 Keb. 623, 659; s. c. 1 Lev. 292; 1 Com. Dig. tit. Accord, (D. 1,) page 128, *Rose's ed.* But if the only matter in dispute between the parties were, whether a bond which the one holds against the other has been paid or not, I have no doubt but that they may mutually agree, even by parol, to submit to the arbitrament of one, two, or more persons, and the award when fairly made, will be binding and conclusive upon them. There is no rule of law nor prin-

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ciple of policy, which prohibits men from selecting such tribunal to pass upon and to decide their disputes in such cases, and, being so decided, the maxim *expedit reipublicæ ut sit finis litium* applies. Ferrer's Case, 6 Co. 7.

And in the last place it is urged, that the defendant has not shown by his plea, that the bond in suit formed any part of the matters in variance which were submitted, and that the arbitrators therefore, in awarding a discharge of the bond, exceeded their authority, and consequently the award, in that particular, is void. In answer to this, it is said by the defendant's counsel, that for such omission in the plea, if it does exist, the plaintiff ought to have replied *nul agard fait*, and that he cannot avail himself of it on demurrer. Although the plaintiff might perhaps have taken advantage of this omission upon such replication, Macomb v. Wilber, 16 Johns. 227, yet, I apprehend, that is not the only mode by which he may do it. He might, I think, have done it by replying specially. Bean v. Farnum *et al.*, 6 Pickering, 269. And I have no doubt, where the award is bad or insufficient from the party's own showing, to answer his purpose, and it be made the foundation of a suit, or of a defence to a suit brought, the opposite party may take advantage of it by demurrer. 1 Saund. Rep. 327, a (note e,) by Patteson and Williams, 327, b, note (3).

Awards are certainly looked on much more favourably now than formerly, and may be said truly to have become great favourites with the legislature of this state, who have put in the power of a party litigant, however unwilling his adversary [*304] may be, to have *almost any case whatever tried and decided by arbitrators; subject, however, to appeal therefrom, by either party, within a limited time, upon his paying all the costs accrued, and giving bail to prosecute his appeal.

But still, there are certain fundamental principles which cannot be dispensed with, and must be regarded in order to render awards effectual; such as certainty, at least, to a common intent; that they shall be final, and that the matter awarded on shall have been within the terms of the submission. Archer v. Williamson, 2 Harris & Gill, 62. The arbitrators derive all their authority from the submission; they must be confined to the subject-matter within it, and pursue it strictly. Pratt v. Hackett, 6 Johns. 16; Solomons v. M'Kinstry, 13 Johns. 27. And this they must do in point of form, as well as in point of substance. Henderson v. Williamson, 1 Stran. 116; 2 Saund. 62, and note (3).

Hence, in declaring upon an award, or in pleading it as a

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bar to an action brought, it becomes material to aver a mutual submission, and to state, at least in general terms, the subject-matter of it, so that it shall appear distinctly that that which is claimed by the party, and was awarded in his favour, came within the terms of the submission. 2 Saund. Rep. 61, h and i. Then how is it in this case? The defendant in his plea has shown, that the submission was "of all matters in variance between the parties," but there is no averment nor allegation in any form, that the writing obligatory in suit was the matter in variance or formed any part of it. Then again, it is further stated in the plea, that the arbitrators made their award "of and concerning the premises, and of and concerning the said writing obligatory." Now it is true that these latter words, "of and concerning the said writing obligatory," show clearly enough that the bond in suit was embraced in the award of the arbitrators, but unfortunately for the defendant, they also import most unequivocally, as it appears to me, that the bond or writing obligatory was no part of the "premises," which term refers to, and is substituted for the previous words, "all matters in variance between the parties," showing the extent of the submission; because if the bond had been embraced within the words "and of and concerning the premises," then the following words, "and of and concerning the said writing obligatory," would have been unnecessary. If those latter words had been omitted altogether, I am inclined to think that the want of an express averment, that the writing obligatory either was, or else formed a part of the matters in variance between the parties, it not being among the causes assigned for the demurrer, would not have been a substantial defect, and that it might have been supplied by inference which would have comported with all that was averred; but from the manner in which the writing obligatory is here introduced into this plea, and connected with the preceding clause, "of and concerning the premises," by the copulative "and," it conveys the idea very distinctly, that the writing obligatory which was awarded on, was additional matter to that embraced *within the immediately preceding terms, "premises." [*305] Now the word "premises" means, and indeed can mean nothing else, than "all matters in variance between the parties," so that the writing obligatory is stated by the defendant in his plea to have been awarded on by the arbitrators, over and above "all matters in variance between the parties," at the time of the submission. The award, therefore, as to this part of it, must be considered void, and consequently no bar to the plaintiff's action. The judgment of the court below must therefore be reversed, and judgment entered on the plea demurred

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to in favour of the plaintiff, and the record remanded that the cause may be tried on the other pleas.

Judgment reversed, &c.

Cited by Counsel, 1 W. & S. 258; 2 J. 183.

Cited by the Court, 5 R. 178.

[PHILADELPHIA, MARCH 29, 1833.]

Humphreys *against* Kelly.

IN ERROR.

It is error to permit a party to read so much of the docket entries of the suit under trial, as shows that the opposite party had appealed from an award of arbitrators; though neither the award itself was read, nor that part of the docket entries which showed what the award was.

THIS was a writ of error to the Court of Common Pleas of *Delaware* county, in an action on the case brought by the defendant in error, Dennis Kelly, against the plaintiff in error, Joshua Humphreys, to recover damages for diverting the water of Pont Reading Creek, for the plaintiff's mills.

On the trial in the Court of Common Pleas, a great mass of evidence, both documentary and parol, was given, and thirteen legal propositions were submitted to that court, on which they were requested to instruct the jury. Their answers to these propositions, their general charge to the jury, and their opinions upon several questions of evidence which arose in the course of the trial, were assigned as error here. Among the evidence, to the admission of which by the court below, exception was taken by the counsel of the defendant below, were the docket entries in this suit, embracing that part of them which showed that the defendant below had appealed from an award of arbitrators, but omitting that part which showed what the award was. As this is the only point upon which a distinct opinion was expressed by this court, it is deemed unnecessary to swell the report of the case by stating at large its circumstances, and the other points to which they gave rise.

Edwards and *Kittera*, for the plaintiff in error.

Dick and *Tilghman*, for the defendant in error.

[*306] *PER CURIAM.—It is unnecessary to express a distinct opinion on all the points propounded, as it clearly

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appears there is no error in any part of the record but one. Some of the points were even immaterial. The implication of a grant of the water-right from long enjoyment, for instance, or the supposed effect of the recitals in the different conveyances, was strictly so. When the original owner of the whole conveyed the mill tract, he impliedly conveyed a perpetual right to the water-course in the land retained by him, so far as it was then enjoyed, as an actual appurtenance to the mill. It is clear too, that the right having been acquired by any means, could not be lost by any discontinuance of its enjoyment when the whole estate came to be possessed again by the owner of the Pont Reading farm, in consequence of his having purchased the interest of the tenant in tail of the mill tract. A right by adverse enjoyment, though analogous in some respects to the statute of limitation, is founded, in the presumption of a grant; and the loss of it by discontinuance is founded in the presumption of a release. But if the owner of the Pont Reading farm, standing, as he did, in the place of the tenant in tail of the mill tract, was without legal capacity to release to himself, there is no room for any presumption on the subject; and beside, an actual release or conveyance by him to a third person, would not be suffered to prejudice the issue in tail. The matter, however, in which error was committed, was the reading of so much of the docket entries as showed the plaintiff in error to be an appellant from an award of arbitrators. This, we are told, was necessary to show that the action was prior in point of time to another between the parties, in which it was alleged the injury complained of had been compensated by a verdict. But that fact, if it were material, might have been shown by other evidence; and it is, beside, impossible not to see, that the drift of the evidence was to give the plaintiff the benefit of whatever impression might be made on the minds of the jurors by the fact that the cause had once been determined in his favour by judges of the parties' own choosing. This may have been a substantial injury, and the defendant ought not to have been exposed to the danger of it.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 6 Wh. 167; 12 C. 159.



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*[PHILADELPHIA, MARCH 29, 1833.]

The Bank of Pennsylvania *against* M'Calmont and Others, Assignees of Strawbridge.

A. drew a note for thirteen hundred and fifty dollars, for the accommodation of B., dated 21st of August, 1822, payable sixty days after date to C. or order, who indorsed it for the accommodation of B., who after indorsing it himself, got it discounted at the Bank of P., where he received the proceeds of it. B. by his agreement with the drawer and payee of the note, was to pay it at maturity. Before this time arrived, however, B. failed, and on the 13th of September, 1822, executed an assignment of all his estate to trustees, for the benefit of his creditors, on certain conditions, one of which was to pay and discharge all the debts that were by him then due, or were owing, or growing due, to such of his creditors, as should within the space of ninety days, after the date of the assignment, if residing within the United States, and within six months, if residing elsewhere, execute a general release of all demands and debts whatsoever against him, paying such creditors their debts in full, if the estate should be sufficient for that purpose, and if not, paying them in equal and ratable proportions, according to the amount of their debts respectively. The assignor furnished to his assignees a list of his debts, including the note in question. On the 14th of September, 1822, A., the drawer, having also failed, executed an assignment of all his estate to trustees, for the benefit of such of his creditors as should within thirty days from that date, execute a release of their claims against him. These trustees were authorized to make compromises, or any other arrangements which they might think beneficial to the trust. On the 14th of October, 1822, at half-past nine o'clock, A. M., the Bank of P., the holders of the note in question, and other creditors of B., executed to him a full release, according to the provisions of the deed of assignment, of all debts and demands, and of all actions and manner of action, &c., which they then had, or thereafter might have, by reason of the debts to them respectively due, or owing, or growing due, from the said B. This release was executed, among others, by the assignees of A. On the same 14th of October, at ten o'clock A. M., the Bank of P. executed to A. a general release which had been procured for his creditors to sign, in compliance with the condition contained in his assignment, and had been executed about a week before by the assignees of B. The note fell due on the 23d of October, 1822, and was protested, of which notice was duly given to B., the indorser. On the 25th of February, 1823, the assignees of A. paid to the Bank of P. a dividend of ten per cent. on the said note. On the 26th of March, in the same year, notice was given to the Bank of P. that the creditors of B. should send in their claims to his assignees, in order that they might declare a dividend. On the 25th of February, 1824, another dividend of ten per cent. was paid by the assignees of A. to the Bank of P. Two dividends were declared by the assignees of B., one of thirty-three and a third per cent., and the other of ten per cent. on the debts of the assignor, and the Bank of P. having brought suit against the assignees of B., to recover these two dividends, it was held:

1st. That B. was a competent witness for the plaintiffs to prove, that although A., was indebted to him on his private account in a small sum, and on their partnership accounts in a large sum, yet the note was not given or drawn on account of this indebtedness, but for the accommodation of the witness, with an understanding that he was to take it up when due, wherever he might get it discounted; and that he did not seek payment of the debt owing to him by A. because he knew from A.'s circumstances that he was unable to make it.

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2d. That the release of the Bank of P. to A. the drawer of the note, did not discharge B. the indorser, and was therefore no bar to the plaintiff's recovery.

3d. That the Bank of P. were embraced by the terms of assignment of B., though the debt owing to them was not due at the time of its execution, and that they were entitled to recover the dividends declared by his assignees.

4th. That the rule for making a dividend, where more than one of the persons liable to the payment of a note or bill have failed, and made voluntary assignments of their property for the purpose of paying their respective debts and liabilities, is to take the amount actually due upon the note or bill, at the times respectively at which the first dividend is declared of each fund so assigned.

*THIS case was tried at Nisi Prius, before Huston, J., on the 31st of January, 1828, when a verdict was [*308] taken for the plaintiffs, for five hundred and eighty-five dollars, subject to the opinion of the court upon the whole of the evidence, as to the plaintiff's right to recover, and the amount to which they were entitled.

There was a motion also on the part of the defendants for a new trial, founded upon the admission by the judge of John Strawbridge, as a witness for the plaintiffs, who was objected to both on the ground of an alleged interest in the event of the suit, and of the nature of the evidence he was called to give.

The cause was argued by *Purdon* and *Chauncey* for the plaintiffs, and by *J. S. Smith* and *Binney* for the defendants; after which, the opinion of the court, in which the whole case is stated, was delivered by

KENNEDY, J.—This was an action brought against the defendants, who had become the assignees of the estate of John Strawbridge, in trust for the benefit of his creditors, upon certain conditions, to recover the amount of two dividends upon a note drawn by George Strawbridge for the accommodation of John Strawbridge, for thirteen hundred and fifty dollars, bearing date the 21st day of August, 1822, and payable sixty days after the date thereof to Jonathan Smith, or order, who indorsed it for the accommodation of John Strawbridge, who after indorsing it himself, got it discounted at the Bank of Pennsylvania, where he received the proceeds of it.

John Strawbridge, by his agreement with the drawer and payee of the note, was to pay it at maturity. Before, however, this time came around, John Strawbridge failed, and on the 13th of September, 1822, executed a deed of assignment to George M'Calmont, John Turner, Jr., and John Hemphill, the defendants in this action, of all his estate, both real and personal, in trust:—First, to pay all the expenses of the execution of the trust. Second, to pay all such custom-bonds as were then due

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by him, or owing, or growing due, or for the payment of which he was in any way liable. Third, to pay and discharge all the debts that were by him then due, or were owing or growing due to such of his creditors as should within the space of ninety days after the date of the assignment, if residing within the United States, and within six months if residing elsewhere, execute a general release of all demands and debts whatsoever against him; paying to his said creditors their debts in full, if the estate thereby assigned should be sufficient therefor; if not, then in an equal and ratable proportion, according to the amount of their debts respectively. And in the last place, after satisfying and discharging the debts aforesaid, then to pay all his other creditors in equal proportion, according to the amount of their respective debts. He also furnished a list in writing to his assignees of his debts, which included the note in question.

On the 14th of September, 1822, George Strawbridge, the drawer of the note, having also failed, executed an assignment [*309] to Henry *Simpson and John H. Linn, of all and all manner of goods, chattels, book accounts, stocks, debts, effects, and all other estate and things of what nature and kind soever of him the said George Strawbridge, in trust, after paying the expenses incident to the execution of the trust, to pay and satisfy all such of his creditors as should within thirty days from that date execute legal releases of all their claims and demands upon him to the full amount thereof; paying them in full if sufficient, and if not, then ratably and proportionably. These trustees were authorized, by the deed of trust, among other things, to make compromises, or any other arrangements they might think beneficial to the trust.

On the 14th of October, 1822, at half-past nine o'clock in the morning, the plaintiffs in this action executed a release, which had been prepared by John Strawbridge for his creditors generally to sign, in compliance with the condition contained in the deed of assignment, and is in the following terms: "To all to whom these presents shall come, we, who have set our hands and seals hereunto, creditors of John Strawbridge of the city of Philadelphia, merchant, send greeting. Whereas, the said John Strawbridge is indebted unto us respectively in certain several sums of money, for the payment of which he has assigned over all his estate, real and personal, by indenture, to certain trustees therein named, for the use of and to the intent that the same may be divided among his creditors, according to the provisions of the said indenture. Now know ye, that for the consideration aforesaid, each of us, the said creditors, who have hereto set our hands and seals, for himself, his heirs, executors, administrators, successors, and co-partners, doth, by these pres-

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ents, remise, release, and forever discharge the said John Strawbridge, his heirs, executors, and administrators, of and from our said several debts and demands, and from all actions and manner of action, and actions and suits, which against the said John Strawbridge each of us now hath, or which each of us, and every of our heirs, executors, or administrators respectively may hereafter have, by reason of the said several debts to us respectively due or owing, or growing due, from the said John Strawbridge. In witness," &c.

This release was also executed by Henry Simpson and John H. Linn, the assignees of George Strawbridge.

On the same 14th of October, at ten o'clock in the morning, the plaintiffs also executed a release to George Strawbridge, which had been procured by him for his creditors to sign, in compliance with the condition contained in his assignment, and had been executed about a week before by the defendants, as the assignees of John Strawbridge. It is in the following terms: "Know all men by these presents, that we, whose names are hereunto subscribed, do hereby remise, release, and forever discharge, George Strawbridge of the city of Philadelphia, merchant, and his heirs, executors, and administrators, of and from all, and all manner of actions, and causes of action, suits, debts, dues, accounts, bonds, covenants, contracts, *agreements, [*310] judgments, claims, and demands whatsoever, at law or in equity, which, against the said George Strawbridge we, or any of us, ever had, now have, or which our or any of our heirs, executors, or administrators hereafter can, shall, or may have, for or by reason of any cause, matter, or thing whatsoever, from any period of time heretofore, to the date of our respective executions of these presents."

The note fell due on the 23d of October, 1822, and was protested for non-payment, of which notice was duly given to John Strawbridge as the indorser.

On the 25th of February, 1823, the assignees of George Strawbridge, paid to the plaintiffs a dividend of ten per cent., amounting to one hundred and thirty-five dollars. On the 26th of March, in the same year, notice was given to the plaintiffs, that the creditors of John Strawbridge should send in their claims to the counting-house of the assignees, in order that they might declare a dividend. And again, on the 25th of February, 1824, another dividend of ten per cent. amounting to the like sum of one hundred and thirty-five dollars was paid by the assignees of George Strawbridge, to the plaintiffs.

Anterior to the bringing of this suit, two dividends were declared by the defendants as the assignees of John Strawbridge; one of thirty-three and one-third per cent., which, on thirteen

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hundred and fifty dollars, would amount to four hundred and fifty dollars: and the other of ten per cent., which would amount to one hundred and thirty-five dollars, if calculated on the same sum. This action is brought to recover these two dividends.

On the trial of the cause, John Strawbridge was offered as a witness by the plaintiffs, to prove that the note of thirteen hundred and fifty dollars was drawn by George Strawbridge for the use and accommodation of the witness. He was objected to by the defendants' counsel, but admitted by the judge who tried the cause. He testified that although George Strawbridge was indebted to him on his private account, in the sum of thirty-three dollars, and on their partnership accounts in the sum of nine thousand dollars, yet the note was not given or drawn on account of this indebtedness, but for the accommodation of the witness, with an understanding that he was to take it up when due, wherever he might get it discounted: That he did not seek payment of the debt owing to him by George, because he knew from his circumstances that he was unable to make it.

A verdict of the jury was given in favour of the plaintiffs for five hundred and eighty-five dollars, with interest from the times of declaring the dividends respectively, subject, however, to the opinion of this court, whether, on the whole of the evidence, which went to establish the facts as already stated, the plaintiffs were entitled to recover anything in this action, and if they were, the court to say what amount.

The first question which presents itself is, was John Strawbridge a competent witness; and in the next place, was his testimony *admissible? I cannot perceive that he had [*311] such an interest in the event of this suit, as would render him incompetent. It is true, it has been urged with great ingenuity, and I must confess too, with great force, that the plaintiffs are not embraced in the assignment made by John Strawbridge: That he was not their debtor at that time, nor yet at the time when they executed the release to him: That he did not become their debtor until the 23d of October, 1822, when the note was protested for non-payment by the drawer, and notice thereof given to him, and that the release which was executed on the 14th of that same month, applied only to debts then existing, and could not therefore be a release of the claim of the plaintiffs, arising upon this note: That the witness is, therefore, still liable in his person and property to the plaintiffs for the payment of the whole amount of the note; but the recovery of the plaintiffs in this action will relieve him from this liability *pro tanto*, which shows that he is directly interested in maintaining the plaintiff's recovery, and therefore an incompe-

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tent witness to sustain it. I, however, after a good deal of inquiry as to the practice and understanding which have obtained in regard to assignments similar to those in the present case, which for many years past have been very common in some parts of this state, and especially in the city and county of Philadelphia, and likewise, after a very deliberate consideration of the whole matter, am of opinion that the plaintiffs and their claim upon the note against the witness are embraced in the assignment made by him, and that he is discharged by the release from all his liability on account of the note, or the indorsement of it, and that all objection to his competency as a witness, on the score of interest, is removed. It has, however, been further objected, that he was incompetent, and his testimony ought not to have been received, because repugnant to a principle of mercantile policy, which will not permit a party to negotiate paper, to annul it, or to change its features or character, after he has in the ordinary course of business given currency to it: That this was the effect of the testimony of the witness, who, after having passed the note by indorsement to the plaintiffs in this case, was called on to prove that it was drawn by the drawer for his, the witness's accommodation, in order to raise money exclusively for his own use, and was discounted by the plaintiffs, from whom he received the proceeds thereof, which he applied to his own use; and was bound by his agreement with the drawer and payee of the note, to pay and take it up at maturity; thus making himself substantially, as it is contended, the drawer of the note, instead of the indorser, and making his liability, as that of the drawer also, different from the purport of the note itself, and the indorsement thereon.

The true meaning of this rule is, as I apprehend, that the party, having given currency to such paper, shall not be permitted to invalidate it, nor to impair it as a security, nor to change the liabilities of the parties respectively, contrary to the tenor and form of the note or paper and the indorsements thereon, to the prejudice of the *holder thereof; because this [*312] would not only be in violation of good faith, but also destructive of that public confidence which gives life and action to such paper, and is so indispensably necessary to make it answer the purpose intended. But I see no good objection to having the true character of the original transaction exposed and made known, when it is required, by the holder, in order to promote his interest and security, more than there would be to its being done between those who first framed it, which it is admitted on all hands may be done, and is certainly every day's practice. The testimony then, in this case, was not offered with a view to invalidate the note; and was offered by the plaintiffs

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who were the holders of the note. It was offered to show that the witness, who was the last indorser on the note, was the real debtor to whom the money was advanced by the plaintiffs, for his own use, upon the note, and that he was to pay it, without suffering the others, whose names were on it, to be called on for that purpose, as they derived no advantage from it. In short, to prove that the plaintiffs were the creditors of the witness at the time he made his assignment, and that he was their debtor, and consequently that they were embraced within the terms of the assignment. I think that it was not only competent for the plaintiffs to show all this, but that John Strawbridge, the last indorser on the note, was a competent witness to prove it, and that he was therefore properly received as a witness for that purpose.

The testimony of John Strawbridge having been properly received on the trial of the cause, establishes clearly that the note was made for his accommodation and exclusive benefit, which disposes of one of the objections made by the defendants to the plaintiffs' recovery, that it was not an accommodation note.

But then it is further contended, that although it be an accommodation note, the release by the plaintiffs of George Strawbridge, the drawer of it, discharged John Strawbridge, the indorser, and that they therefore can have no claim as creditors of him to any portion of the funds assigned by him to the defendants for the payment of his debts.

To this it may be answered, that the plaintiffs did not execute the release to George Strawbridge, until after they had executed one in favour of John Strawbridge, in compliance with a condition required by him in his assignment, in order to entitle them to a certain grade of preference upon the fund assigned by him for the payment of their debt. By this arrangement, I consider that they are embraced by the terms of the assignment, which I shall endeavour to show more fully in answer to the next objection, became absolutely entitled to their proper proportion of this fund, which had been given up to them, or to the defendants, for their use, with others, which is in effect the same, to be applied towards the payment of their debt, by the very man who, in point of fact, was the real debtor, and so considered and acknowledged by himself to be; and how or why the subsequent release of George Strawbridge could divest the plaintiffs [*313] of their right to this fund, I cannot imagine. Such release could work no possible injury to John Strawbridge, nor yet to any of his creditors who had a claim upon the fund in the hands of the defendants. I am therefore inclined to think that this release which was given by the plain-

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tiffs to George Strawbridge, is no bar to the plaintiffs' recovery in this action.

The next and last objection which has been raised against the plaintiffs' recovery in this case, is, that they are not embraced in the terms of the assignment made by John Strawbridge, which are "to pay and discharge all the debts that were by him then due, or were owing or growing due, to such of his creditors as should," &c., and that the plaintiffs' claim does not fall within this description. In support of this, it has been argued that John Strawbridge was not absolutely bound by his indorsement to the plaintiffs for the payment of the amount of the note: That his liability was only conditional and contingent; and that the nature and extent of his liability must be determined solely by his indorsement, and according to its legal effect: That by his indorsement he merely promised to pay the plaintiffs the amount of the note, provided they would present it at maturity to the drawer, demand payment of him, and upon his failing to pay, give immediate notice thereof to him, the indorser, but not otherwise: That until all this had taken place, it could not be said that John Strawbridge, the indorser, was indebted to the plaintiffs anything upon his promise, and possibly never might become so; for if the drawer paid the note at maturity upon its being presented to him for that purpose, neither lapse of time, nor anything that the plaintiffs could do, would ever make the indorser debtor to the plaintiffs or make them his creditors; but without indebtedness there could be no debt, and as no debt ever existed, it could not be said that any was either due, owing, or growing due; and consequently the plaintiffs did not come within the provisions of the assignment. This all appears to be very specious, and I must confess that I was at first so much taken with it as to incline to give in to it; but after revolving the whole case over and over again in my own mind, and upon more full deliberation and inquiry in to the practice and usage which have obtained under such assignments, and especially in respect to those who have generally been considered and allowed to claim as creditors under them, I have come to the conclusion that the plaintiffs are included in the terms of the assignment, and entitled to recover.

The note having been given without consideration, for the accommodation of John Strawbridge, no debt of any kind existed until he got the note discounted, but as soon as that was done a debt was created most clearly, and that too by his act, for his own exclusive benefit; and under his agreement with the drawer and payee of the note, he then became absolutely bound to pay it at maturity, to the *bona fide* holders, whoever they might be. Although not absolutely bound to pay by virtue of his indorse-

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[*314] ment, yet, I conceive, that there cannot *be a material difference if he were so upon any principle, and that he was, under his engagement with the drawer and payee, is indisputable. It is clear, then, that a debt was created before the assignment was made, and was growing due at that time; that John Strawbridge, the assignor of the defendants, was in reality the debtor, and the plaintiffs were the creditors, and that he was under an obligation to pay them in any event. Indeed, under a full view of the whole ground of the case, I cannot perceive that his liability had the least shade of contingency about it. On the contrary, I think it was certain, absolute, and unqualified. Neither do I think it necessary that this absolute liability should have arisen from this indorsement, nor that it should have grown out of a promise made directly to the plaintiffs themselves. It is sufficient that it existed at the time of the assignment, and was connected with the note in such a way as to follow and accompany it; and this, I think, was clearly the case. The plaintiffs held the note upon which they had advanced him the money, to be repaid according to the tenor of it. To them payment was to be made, and to no others could it be made as long as they kept the note. They, and they alone, had the power to release the assignor of the defendants from the payment of it; unless, indeed, the drawer or payee had paid it for him, which was not to be expected, because contrary to their agreement with him when he obtained it from them. The assignor of the defendants, sensible of his indebtedness, and absolute liability and engagement to pay this note, either at the time of, or shortly after making the assignment, made out a list of all his creditors, in which, among others, the plaintiffs' names were inserted, with the amount of the note thereto annexed, as the sum that was due to them, which he delivered to the defendants as well as the assignment. The plaintiffs had no claim whatever against him beside the one created by discounting the note. They agreed to the assignment, and accepted of it by fulfilling the condition thereby required of them, in executing releases, which completely exonerated and discharged the assignor from all liability, either direct or indirect, absolute or contingent, for and on account of this note. The release which was executed to himself, must be admitted to be sufficient to extinguish all liability which he was under to them directly; and the release which they gave to George Strawbridge, the drawer of the note, not only discharged him, but likewise the payee, so that neither of them could be made liable to pay anything on account of the note or this debt, for which they could look to John Strawbridge for indemnity. This was all that the assignor sought for or required, in order

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to give to the plaintiffs the right and the preference which they now claim; and he, having obtained his object to its fullest extent, within the time allowed for that purpose, they are justly entitled to a due proportion of the trust fund, in return for their concession to him. The right too, which is set up here on the part of the plaintiffs, so far as I have been able to ascertain upon inquiry, is sanctioned by the universal practice in *allowing such claims, and in paying dividends upon [*315] them under similar assignments; and the distinction which has been made, and so ingeniously and ably contended for in this case, between absolute and contingent liability, has not been regarded or attended to in adjusting and settling claims and paying dividends out of funds assigned voluntarily by creditors for the payment of their debts. Neither am I altogether satisfied, that if it were attempted to be taken and acted on, the task would be found to be altogether free from difficulty in many cases that would arise. It was insisted on by the counsel for the defendants, that the promise of the indorser of a negotiable note, arising out of his indorsement by implication, was merely conditional, and his liability, and the debt as to him, purely contingent; yet the drawer of bills of exchange, whose responsibility has sometimes been likened to that of the indorser of a negotiable note, where he is also the payee, and has passed it away in the course of business, was, in the case of *M'Carty v. Barrow*, 2 Stran. 949, ruled to have contracted the debts the very instant when he drew the bills, and that the non-acceptance or protest did not raise any debt, but was only notice to the party who held the bills, that the drawee would not pay the same; and was as much as to say, "I will not pay the bills; you may go back to the drawer, and he must pay you." And the court held the debts to be *debita in presenti, solvenda in futuro*, by the drawer. See *Id.* Chief Justice Wilmot's report of this case, given in the opinion of the court delivered by him in *Chilton v. Whiffin*, 3 Wils. 17, which is more full, and no doubt more accurate, than Sir John Strange's. And see also the case *Ex parte Douthat*, 4 Barn. & Ald. 67, where the same principle was settled and certified by the judges of the King's Bench, to the lord chancellor, in a case where the bill was accepted and duly paid by the drawee. I however deem it unnecessary to enter into a critical examination of this question, and the cases and authorities which might be thought to have a bearing upon it, as under the view which I have taken of the case itself, I can entertain no doubt, but a debt was created by John Strawbridge, the instant that he got the note discounted by the plaintiffs, which by his own agreement, he was abso-

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lutely bound to pay to the plaintiffs, or whoever should happen honestly to hold the note, at the time it became payable.

The only thing which remains now to be considered and settled, is the rule by which the amount of the plaintiffs' demand ought to be ascertained. Upon inquiry, I am induced to believe, that the rule which has been adopted generally in practice, where more than one of the persons liable to the payment of a note or bill have failed, and made voluntary assignments of their property for the purpose of paying their respective debts and liabilities, is to take the amount actually due upon the note or bill, at the times respectively at which the first dividend is declared, of each fund so assigned. For example, take the case before us: the first dividend was declared of the property assigned by George Strawbridge, in February, 1823, when the [*316] *thirteen hundred and fifty dollars, the original amount of the note, were due and altogether unpaid. This then was the sum upon which, according to the rule observed in practice, the dividend ought to have been declared. It was accordingly done so, and paid to the plaintiffs. Being ten per cent., it amounted to one hundred and thirty-five dollars, which reduced the plaintiffs' debt to twelve hundred and fifteen dollars, which is the sum that the defendants, when they subsequently, in March, 1823, and also since that, declared dividends, ought to have allowed dividends on to the plaintiffs.

This rule possibly has been derived from that which seems to have been adopted in England in cases of bankruptcy, which is, to take the amount of the debt actually due at the time of the creditor's first proving it against the fund. See *Ex parte Wildman*, 1 Atk. 109; s. c. 2 Ves. 113; *Ex parte Royd* and *Ex parte Bennet*, cited 2 Ves. 114, and *Ex parte Leers*, 6 Ves. 644. The only difference between the two cases seems to be, that in the case of bankruptcy the amount of the debt due at the time of the creditor's first proving it, is taken as the sum for which a dividend shall be allowed, but in the cases of voluntary assignments here, the amount due at the time of declaring the first dividend of each fund respectively, is taken as the sum upon which the dividend is to be allowed. I do not see any sufficient reason why this rule, which has already been adopted in practice here, should not also be adopted by the courts; for if it be as well suited as any other to subserve the ends of justice, and I think it is, it has at least the advantage of being known and familiar to that portion of the community who have the most to do with it, which is no slight recommendation for its adoption by the court. And indeed, it is highly probable, that from the long experience which has been had of its operation, without any attempt that we have heard of, to change it, it is quite

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as equitable, just, and salutary, as any other that could be substituted.

We therefore direct the sum of each of the two dividends for which this suit was brought, to be ascertained by this rule, that interest be calculated on each from the time it was, it ought to have been declared, and that judgment be entered for the aggregate amount thereof in favour of the plaintiffs.

Judgment for the plaintiffs.

Cited by Counsel, 3 Wh. 536; 3 W. & S. 287; 4 W. & S. 289; 3 Barr, 384; 10 Barr, 396; 1 H. 48; 3 H. 62; 8 H. 470; 9 Wr. 155.

Cited by the Court, 5 Wh. 575; 8 W. 309; 3 W. & S. 558; 9 Barr, 508; 11 C. 482.

Approved and followed, 5 R. 173; but both these cases discussed and overruled in 1 N. 114, s. c. 3 W. N. C. 82.

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Poole *against* Williamson.

APPEAL.

Under the act of the 4th of April, 1798, the lien of a judgment is restricted to a period of five years from the first return day of the term of which it is entered, and the second period begins to run from the termination of the first. Consequently, where a judgment has been once regularly revived by *scire facias*, if ten years have elapsed from the first return day of the term of which the original judgment was entered, a second revival by *scire facias* comes too late as against an intervening mortgage.

THIS case came before the court on an appeal from the decree of the District Court for the city and county of *Philadelphia*, distributing part of the proceeds of the real estate of Poole, which had been sold under a *venditioni exponas*. The decree was brought into this court by Hester Golly, a judgment creditor, under the provisions of the act of 16th of April, 1827, "relative to the distribution of money arising from sheriff's and coroner's sales." The facts were these: The proceeds of the sale had been distributed by the sheriff, except the sum of four hundred and thirty-six dollars, which had been paid into the District Court, by which it was awarded to Sidney Williamson, a mortgage creditor, to the exclusion of the judgment creditor above mentioned. It appeared that Hester Golly, on the 29th of April, 1817, entered a judgment for four hundred and thirty-six dollars on a bond accompanied by a warrant of attorney, to March Term, 1817. The bond was payable in one year from the day on which judgment was entered on it. This judgment

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was revived by an amicable *scire facias* to March Term, 1822, on which judgment was entered by agreement, on the 26th of March of that year. A second *scire facias* was issued to June Term, 1827, and by agreement indorsed on the writ on the 17th of March, 1827, the day on which this *scire facias* issued, judgment was entered therein. It was agreed that the first revival by *scire facias* was good; but it was contended, that although the second *scire facias* issued within five years from the date of the judgment in the first *scire facias* (March 26th, 1822,) yet, as it did not issue until more than five years from the return day of the first *scire facias*, it was not good against the mortgage of Sidney Williamson for two thousand dollars, dated the 4th of February, 1820, and duly recorded.

The question was argued by *Miles* for the judgment creditor, and by *Chauncey* for the mortgage creditor. The authorities cited on the argument, were:—Act of 4th April, 1798, *Purd. Dig.* 421; *Young v. Taylor*, 2 Binn. 218; *Pennock v. Hart*, 8 Serg. & Rawle, 377; *Black v. Dobson*, 11 Serg. & Rawle, 95; *Commonwealth v. Alexander*, 14 Serg. & Rawle, 257; *Leshar v. Gillingham*, 17 Serg. & Rawle, 126.

[*318] *PER CURIAM.—The first revival is conceded to have been in time; and the question is as to the termination of the period to which it extended. The proceedings were entirely under the act of the 4th of April, 1798, by which the lien of a judgment is restricted to a period of five years from the first return day of the term to which it was entered, and the second period must consequently begin to run from the termination of the first. Here, if the second period ended at the termination of ten years from the first return day of the term to which the original judgment was entered, the second revival came too late; and, it seems, the words of the law in favour of this construction, are too imperative to be got over. There was an interval, at which the lien of the mortgage attached, and it was properly allowed a preference.

Decree affirmed

Cited by Counsel, 4 W. 208; 12 N. 29, s. c. 8 W. N. C. 247.

Explained in 4 W. 343.

Cited by the Court, 1 S. 209.

See Act March 26, 1827 (9 Sm. L. 303).

[PHILADELPHIA, MARCH 29, 1833.]

The President, Directors, and Company of the Merchants' Bank of the City of New York *against* the President, Directors, and Company of the Bank of the United States.

IN ERROR.

Where a loss has been sustained by one of two or more innocent persons, it must be borne by him whose act was the cause of it.

Therefore, where the plaintiffs, a bank in New York, stood in the relation of creditor to the defendants, a bank in Philadelphia, and the former received in Philadelphia, from the latter, in payment of the debt, specie drawn from other banks, and not from the defendants' own vaults, contained in boxes taken at the tale of those banks by the defendants in the first instance, and afterwards by the plaintiffs' agent, who had an opportunity, and every necessary facility to tell the money for himself, but omitted to do so, and the specie was afterwards, under the direction of the plaintiffs' agent, transferred from the boxes to kegs, and sent to New York, where it was afterwards discovered that there was a deficiency in some of the kegs, but it was impossible for the defendants to ascertain in which of the banks from which they had drawn the specie, the errors had occurred, it was held that the plaintiffs were not entitled to recover the amount of the alleged deficiency.

THIS was a writ of error to the District Court for the city and county of *Philadelphia*, in an action brought by the plaintiffs in error against the defendants in error, to recover the sum of one hundred and ninety-two dollars, with interest from the 3d of December, 1825, for a deficiency of silver delivered by the latter to the former, in payment of certain drafts, amounting together to forty-two thousand one hundred and thirty dollars. The amount received in payment turned out to be only forty-one thousand nine hundred and thirty-eight dollars.

*The deficiencies occurred in five kegs—

1.	Marked	\$3000	deficient	\$75	00
2.	"	2480	"	3	50
3.	"	3000	"	58	50
4.	"	3000	"	53	50
5.	"	2650	"	1	50

\$192 00

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It appeared in evidence on the trial in the District Court, that on the 3d of December, 1825, the plaintiffs sent to Philadelphia an agent to present to the defendants certain negotiable paper amounting to forty-two thousand one hundred and thirty dollars, for which he was instructed to demand specie. On presenting

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the drafts to the first teller of the United States Bank, he was told that they would draw for the amount on other banks in the city, and hand it over to him as soon as it was received; at the same time he was requested to call again at a certain hour named by the teller. The defendants accordingly drew out of three other banks eighty-nine thousand dollars in specie, of which the first teller directed forty-two thousand dollars to be handed over to the plaintiffs' agent. The latter returned to the bank at the time specified, which was about four or five hours after his first visit, when he received from the first teller certain boxes, said by him to contain specie to the amount of forty-two thousand one hundred and thirty dollars. The boxes were brought from carts into the Bank of the United States, and not from the vaults of the bank. The agent of the plaintiffs, for the purpose of better securing the money, caused it to be taken out of the boxes, placed in kegs made purposely for specie, lined with hoops nailed on the inside of the chimes and the outside of the heads, and iron hooped or bound. This was done in the Bank of the United States by a cooper employed by the plaintiffs' agent, in his presence, and also in the presence of the porter and several other officers of the Bank of the United States, particularly of the first teller. The porter was present during the whole time they were repacking the specie. There were forty-two boxes, each said to contain one thousand dollars, and the balance, of one hundred and thirty dollars, was paid at the counter. The boxes were placed in the back room of the Bank of the United States, where there was ample room for counting it, and tables placed for that purpose, and it was proved to be the practice of the bank to allow time for counting there after banking hours. The kegs remained at the Bank of the United States until the plaintiffs' agent took them away for transportation. From the bank they were taken on board the steamboat, where they remained under the charge of the agent of the transportation line, until the return of the plaintiffs' agent, who had gone to some other banks for specie which he had to receive. He took his passage on *board the [320] steamboat in which the specie was placed, and accompanied it as far as Trenton, from which place it was transported to Brunswick in wagons, accompanied by himself, and from Brunswick it was carried on board a steamboat to New York, where it was delivered at the bank of the plaintiffs. From the time the steamboat left Philadelphia, with the specie on board, until it was delivered at the Merchants' Bank in New York, by their agent, it was constantly under his eye. When it was delivered there, the kegs were in good condition, uninjured, and bore no marks of violence. When the specie was delivered to the

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plaintiffs' agent he was not requested to count it, nor was any objection made to his doing so. On his examination as a witness in the cause, he stated, that he thought it would have taken him at least two days to count it. The first teller, who was also examined as a witness, swore that it would require about an hour to tell by weight forty thousand dollars, and that three persons might count that sum in three or four hours. He likewise swore that it was always left to the person who received the money to attend to repacking it. The kegs of specie were delivered by the agent to the first teller of the Merchants' Bank, in New York, on the 6th of December, 1825, and were opened a few days after, behind the counter in the banking-room. From the time they were received, until they were opened, they were kept in the vaults of the bank. The specie was counted by the first teller, assisted by the porter of the Merchants' Bank, when the deficiencies in the kegs above mentioned were discovered. The alleged deficiency was communicated on the 28th of December, 1825, by letter to the cashier of the Philadelphia Bank, who was requested to ask for payment of it from the Bank of the United States. A statement of the amounts deficient in the five kegs was at the same time transmitted. Application for payment was accordingly made to the defendants, by whom it was refused. The deposition of the agent, first teller, and porter of the Merchants' Bank, were then sent on, and the application for payment renewed, which the Bank of the United States again refused.

The first teller of the Bank of the United States testified that there was an understanding between the Bank of the United States and the other banks in this city, that where specie goes in the original boxes, mistakes shall be corrected, but that with foreign banks, the Bank of the United States had never, in any instance, corrected an alleged mistake. There had been some small errors with foreign banks, to the amount of ten or fifteen dollars, and one to the amount of fifty dollars, but in that instance the money had been counted and afterwards weighed. These errors seldom occurred, and had never been corrected. He also testified that if an error had been discovered at the time the specie was repacked, the defendants could have ascertained in what bank it had occurred, but that after mixing it up, there were no means of knowing.

Judge Coxe, before whom the cause was tried, instructed the jury thus:—"That supposing the jury to be satisfied that the deficiency *of one hundred and ninety-two dollars did [*321] exist at the time of the delivery of the boxes in payment of the drafts, then, if the jury be satisfied from the evidence, that Catlin, the agent of the plaintiffs, knew that the boxes

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of money were received from other banks, although he did not know the names of said banks, nor what banks, further than that they were banks of this city ; that he knew the said boxes were marked so as to ascertain the bank from which each was received ; that he knew that the error could be rectified so as to protect the defendants if a deficiency were ascertained in the original boxes—if he knew the defendants delivered the original boxes taken in payment, immediately on their receipt, to facilitate his departure without counting, and relying on his care, diligence, and integrity, as well as that of the officers of the banks from which they were received, and that the boxes were delivered to ascertain if correct, and were placed in a proper room, with counters and other conveniences for ascertaining the amount, and that Catlin, the plaintiffs' agent, knowing these facts, chose to have the original boxes broken open by a cooper, and boy, and the contents thrown into kegs, each containing three boxes, and mixed up the money received from different banks, so that it was impossible to identify them, and thus the said agent of the plaintiffs, knowingly prevented the defendants from protecting themselves from the loss which arose from the errors of the other banks, and not from their own, and the said agent then took on the said money to New York, on the 3d or 4th of December, and delivered the same to the plaintiffs, who kept it until the 25th of December, before they counted it ; if these facts be established from the evidence, in the opinion of the jury, together with the knowledge of them by Catlin, the plaintiffs' agent, I am of opinion it would be contrary to equity for the plaintiffs to recover in this action."

To this opinion the counsel of the plaintiffs excepted.

J. M. Read, for the plaintiffs in error, cited *Com. on Cont.* 326 ; *Lamine v. Dorrell*, 2 *Ld. Ray.* 1217 ; *Jones v. Ryde*, 5 *Taunt.* 488 ; *Bank of the United States v. Bank of Georgia*, 10 *Wheaton*, 342 ; *Curcier v. Pennock*, 14 *Serg. & Rawle*, 51 ; *Raymond v. Baar*, 13 *Serg. & Rawle*, 318 ; *Gloucester Bank v. Salem Bank*, 17 *Mass. Rep.* 33 ; *Cox v. Prentice*, 3 *Maul & Selw.* 344 ; *Gallatin v. Bradford*, 1 *Bibb*, 209 ; 3 *Mason*. 1 ; 8 *Cowen*, 88, 97

Cadwalader, for the defendants in error, cited *Ellis v. Wild*, 6 *Mass. R.* 321 ; *Vernon v. Boverie*, 2 *Show.* 296 ; *Alexander v. Owen*, 1 *T. R.* 226 ; *Shep. Touch.* 142 ; *Wade's Case*, 5 *Rep.* 115 ; *Co. Litt.* 208, a ; *Young v. Roth*, 4 *Bing.* 253 ; 6 *Taunt.* 76 ; 6 *Barn & Cres.* 673 ; *Rep. in Ch.* 68 ; 15 *Ves.* 440 ; *Hart v. Ten Eyck*, 3 *John. Ch. R.* 108 ; ——— *v. Tegg*, 2 *Russell's Ch. R.* 385.

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The opinion of the court was delivered by

GIBSON, C. J.—There is a rule which disposes with perfect and *unquestionable justice of every loss, which must be borne by one of two or more innocent persons, by [*322] assigning it to him whose act was the cause of it. Both parties here are blameless; and the question is, whether the act of the one or the other contributed more to produce the state of things, which renders a loss by one of them inevitable. The facts are, that at the time of the transaction they stood in the relation of debtor and creditor; and that to answer the convenience of the former, the specie given in payment, was drawn from three other banks instead of its own vaults. It was contained in boxes taken at the tale of those banks, by the defendants in the first place, and afterwards by the plaintiffs, whose agent had an opportunity and every necessary facility to tell the money for himself, but omitted to do so; so that according to the custom in such cases, the boxes were delivered and received by common consent, without a particular examination of their contents: consequently, it is unnecessary to decide the vexed question, whether it be the business of the party paying, or the party receiving, to see that the money is right. There was a tacit agreement to deliver and receive the boxes, according to their nominal amount; and though an agreement founded in mutual mistake of a fact which was the inducement to it, be not usually conclusive, where it is not explicitly understood that the parties are respectively to take the risk of the fact as being in a particular way, it certainly is otherwise where the consequences of unravelling the transaction, would put the opposite party in a worse situation than if the agreement had not been made. The creditor requiring a review of the transaction, to ascertain the amount actually paid, must be able to show that the debtor cannot possibly be prejudiced in this respect. How he is to show it, is not the question here, where he has shown, on the contrary, that the defendant would suffer an irretrievable loss from the plaintiffs' own act in confounding the contents of the boxes, and thereby rendering it impossible to fix the deficiency on any particular one of the banks from which the boxes were procured. By the plaintiffs' own showing, then, the act which rendered the loss inevitable, was done by its own agent. In putting the cause to the jury, the judge laid particular stress on the agent's supposed knowledge of the circumstances. That would undoubtedly strengthen the case, as it would be a species of bad faith, knowingly to deprive the defendant of the means of recourse to another for the deficiency, and at the same time to insist that the defendant should make the deficiency good; but it was not an essential ingredient. Between parties equally

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innocent, and consequently equally meritorious as to everything else, the personal responsibility for the act which led to the loss, is sufficient to turn the scale, for the reason, that every man should bear the consequences of his own acts, just as he should bear his own misfortunes. The case then, as it appeared on the evidence, and clearly as it was put to the jury by the court, was one on which the plaintiffs could not recover.

Judgment affirmed.

Cited by Counsel, 3 Wh. 283.

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*[PHILADELPHIA, MARCH 29, 1833.]

Girard *against* The Mayor, Aldermen, and Citizens of Philadelphia.

Vidal and Wife *against* the Same.

CASE STATED.

Real estate, acquired after the making of a will, does not pass under a devise of the residue of the testator's real estate, without a subsequent republication of the will, even where the testator, in addition to the general devise of the residue, declares in a codicil, that it is his wish and intention that all the real estate which he shall thereafter purchase, shall pass by the said will.*

THESE were amicable actions of ejectment, instituted to try the title of the defendants, who were the residuary devisees of the late Stephen Girard, to certain real estate, situate in the city and county of *Philadelphia*, described as follows, in the agreement under which the actions were entered :

"Two houses and lots on Walnut street, between Second and Dock streets, Nos. 63 and 65, and one house and lot on Dock street, No. 61, purchased October 5, 1831, by the late Stephen Girard.

"A lot of land in Passyunk township, containing sixty acres and eighty-seven perches, purchased by the same, October 27, 1831.

* The law on this subject is altered by the following section of the Revised Act "Relating to last wills and testaments," passed April 8th, 1833, (Pam. L. 250:)

"Sec. 10. That real estate acquired by a testator after making his will, shall pass by a general devise, unless a contrary intention be manifest on the face of the will."—REPORTER.

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"A house and lot on the north side of Coates street, west of Sixth street, purchased by the same, October 27, 1831.

"A lot of ground on the north-east corner of Coates and John streets, purchased by the same, November 2, 1831.

"A house and lot in South Third street, No. 48, purchased by the same, November 4, 1831.

"A messuage and lot of ground in Passyunk township, having a front on Schuylkill, purchased by the same, December 1, 1831.

"Stores, wharf, and dock in North Water street, between Market and Arch streets, late Stiles' estate, purchased by the same, December 21, 1831."

The following case was stated for the opinion of the court, to be considered as a special verdict :

"Stephen Girard, Esquire, late of the city of Philadelphia, banker, died on the 26th day of December, 1831—seized in fee of all and singular the real estate set forth in the agreement to enter the above action, purchased by him at the dates mentioned in the said agreement—having first made and executed his last will and testament, dated the 16th day of February, 1830, and codicils thereto, dated *respectively on the 25th day of December, 1830, and the 20th day of June, 1831, duly [*324] proved in the register's office for the city and county of Philadelphia, on the 31st day of December, 1831, [prout will and codicils, which are to be considered as part of this case] and leaving at the time of his death, the following named heirs at law :

"1. Etienne Girard, a brother of the testator of the whole blood.

"2. Antoinetta Hemphill, wife of John Hemphill, Henrietta Clark, wife of John Y. Clark, and Caroline Haslam, wife of John B. Haslam ; the said Antoinetta, Henrietta, and Caroline, being the children of John Girard, deceased, a brother of the testator of the whole blood.

"Francoise Fenellon Vidal, the wife of Louis Vidal ; the said Francoise Fenellon being the daughter of Sophia Girard Capayron, deceased, a sister of the testator of the whole blood."

The following parts of the will only, are material :

"IX. I give and devise my house and lot of ground thereto belonging, situate in rue Ramouet aux Chartrons, near the city of Bordeaux, in France, and the rents, issues, and profits thereof, to my brother, Etienne Girard, and my niece Victoire Fenellon, (daughter of my late sister Sophia Girard Capayron,) (both residing in France,) in equal moieties for the life of my said brother, and, on his decease, one moiety of the said house and

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lot to my said niece Victoire, and her heirs forever, and the other moiety to the six children of my said brother, namely, John Fabricius, Marguerite, Ann Henriette, Jean August, Marie, and Madelaine Henriette, share and share alike, (the issue of any deceased child, if more than one, to take amongst them the parent's share) and their heirs forever.

"X. I give and bequeath to my said brother, Etienne Girard, the sum of five thousand dollars, and the like sum of five thousand dollars to each of his six children above named: if any of the said children shall die prior to the receipt of his or her legacy of five thousand dollars, the said sum shall be paid, and I give and bequeath the same to any issue of such deceased child, if more than one, share and share alike.

"XI. I give and bequeath to my said niece, Victoire Fenelon, the sum of five thousand dollars.

"XII. I give and bequeath absolutely to my niece, Antoinetta, now married to Mr. Hemphill, the sum of ten thousand dollars, and I also give and bequeath to her the sum of fifty thousand dollars, to be paid over to a trustee or trustees to be appointed by my executors, which trustee or trustees shall place and continue the said sum of fifty thousand dollars upon good security, and pay the interest and dividends thereof as they shall from time to time accrue, to my said niece for her separate use, during the term of her life, and from and immediately after her decease, to pay and distribute the capital to and among such of her children and the issue of deceased children, and in such parts and shares as she the said Antoinetta, by any instrument under her hand and seal, executed in the presence of at least [*325] two credible witnesses, shall direct and appoint, and for default of such appointment, then to and among the said children and issue of deceased children in equal shares, such issue of deceased children, if more than one, to take only the share which their deceased parent would have taken if living.

"XIII. I give and bequeath unto my niece, Carolina, now married to Mr. Haslam, the sum of ten thousand dollars, to be paid over to a trustee or trustees to be appointed by my executors, which trustee or trustees shall place and continue the said money upon good security, and pay the interest and dividends thereof from time to time as they shall accrue, to my said niece, for her separate use, during the term of her life; and from and immediately after her decease, to pay and distribute the capital to and among such of her children and issue of deceased children, and in such parts and shares, as she the said Carolina, by any instrument under her hand and seal, executed in the presence of at least two credible witnesses, shall direct and appoint, and for default of such appointment, then to and among the

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said children, and issue of deceased children, in equal shares, such issue of deceased children, if more than one, to take only the share which the deceased parent would have taken if living; but if my said niece, Carolina, shall leave no issue, then the said trustee or trustees, on her decease, shall pay the said capital and any interest accrued thereon, to and among Caroline Lallemand, (niece of the said Carolina,) and the children of the aforesaid Antoinetta Hemphill, share and share alike.

“XIV. I give and bequeath to my niece Henrietta, now married to Dr. Clark, the sum of ten thousand dollars; and I give and bequeath to her daughter Caroline, (in the last clause above named,) the sum of twenty thousand dollars,—the interest of the said sum of twenty thousand dollars, or so much thereof as may be necessary, to be applied to the maintenance and education of the said Caroline during her minority, and the principal, with any accumulated interest, to be paid to the said Caroline, on her arrival at the age of twenty-one years.”

The testator then gave the residue of his estate, to “the mayor, aldermen, and citizens of Philadelphia,” in the manner set forth in the following clause of his will:

“XX. And whereas, I have been for a long time impressed with the importance of educating the poor, and of placing them by the early cultivation of their minds and the development of their moral principles, above the many temptations to which, through poverty and ignorance, they are exposed; and I am particularly desirous to provide for such a number of poor male white orphan children, as can be trained in one institution, a better education, as well as a more comfortable maintenance than they usually receive from the application of the public funds: And whereas, together with the object just adverted to, I have sincerely at heart the welfare of the city of Philadelphia, and, as part of it, am desirous to improve the neighbourhood *of the river Delaware, so that the health of the citizens may be promoted and preserved, and that the [*326] eastern part of the city may be made to correspond better with the interior: Now, I do give, devise, and bequeath, all the residue and remainder of my real and personal estate of every sort and kind, wheresoever situate, (the real estate in Pennsylvania charged as aforesaid) unto ‘the mayor, aldermen, and citizens of Philadelphia,’ their successors and assigns, in trust, to and for the several uses, intents, and purposes hereinafter mentioned and declared of and concerning the same, that is to say: So far as regards my real estate in Pennsylvania, in trust, that no part thereof shall ever be sold or alienated by the said mayor, aldermen, and citizens of Philadelphia, or their successors, but the same shall forever thereafter be let from time to time, to good tenants,

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at yearly, or other rents, and upon leases in possession not exceeding five years from the commencement thereof, and that the rents, issues, and profits arising therefrom shall be applied towards keeping that part of the said real estate situate in the city and liberties of Philadelphia constantly in good repair, (parts elsewhere situate to be kept in repair by the tenants thereof respectively) and towards improving the same, whenever necessary, by erecting new buildings, and that the net residue (after paying the several annuities herein before provided for) be applied to the same uses and purposes as are herein declared of and concerning the residue of my personal estate: And so far as regards my real estate in Kentucky, now under the care of Messrs. Triplett and Burnley, in trust, to sell and dispose of the same, whenever it may be expedient to do so, and to apply the proceeds of such sale to the same uses and purposes as are herein declared of and concerning the residue of my personal estate."

"The following are the two codicils made by the testator :

"Whereas I, Stephen Girard, the testator named in the foregoing will and testament, dated the sixteenth day of February, eighteen hundred and thirty, have, since the execution thereof, purchased several parcels and pieces of real estate, and have built sundry messuages, all which, as well as any real estate that I may hereafter purchase, it is my wish and intention to pass by the said will: Now, I do hereby republish the foregoing last will and testament, dated February 16, 1830, and do confirm the same in all particulars. In witness, I, the said Stephen Girard, set my hand and seal hereunto, the twenty-fifth day of December, eighteen hundred and thirty.

"STEPHEN GIRARD." [L. S.]

"Signed, sealed, published, and declared by the said Stephen Girard, as and for a republication of his last will and testament, in the presence of us, who, at his request, have hereunto subscribed our names as witnesses thereto, in the presence of the said testator and of each other, December 25th, 1830.

"JOHN H. IRVIN,
"SAMUEL ARTHUR,
"JNO. THOMPSON."

[*327] **"Whereas, I, Stephen Girard, the testator named in the foregoing will and testament, dated February 16, 1830, have, since the execution thereof, purchased several parcels and pieces of land and real estate, and have built sundry messuages, all of which, as well as any real estate that I may hereafter purchase, it is my intention to pass by said will: And

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whereas in particular, I have recently purchased from Mr. William Parker the mansion-house, out-buildings, and forty-five acres and some perches of land, called Peel Hall, on the Ridge road, in Penn township: Now, I declare it to be my intention, and I direct, that the orphan establishment provided for in my said will, instead of being built as therein directed upon my square of ground between High and Chestnut, and Eleventh and Twelfth streets, in the city of Philadelphia, shall be built upon the estate so purchased from Mr. W. Parker, and I hereby devote the said estate to that purpose, exclusively, in the same manner as I had devoted the said square, hereby directing that all the improvements and arrangements for the said orphan establishment prescribed by my said will as to said square shall be made and executed upon the said estate, just as if I had in my will devoted the said estate to said purpose—consequently, the said square or ground is to constitute, and I declare it to be a part of the residue and remainder of my real and personal estate, and given and devised for the same uses and purposes as are declared in section twenty of my will, it being my intention that the said square of ground shall be built upon and improved in such a manner as to secure a safe and permanent income for the purposes stated in said twentieth section. In witness whereof, I, the said Stephen Girard, set my hand and seal hereunto, the twentieth day of June, eighteen hundred and thirty-one.

“STEPHEN GIRARD.” [L. s.]

“Signed, sealed, published, and declared by the said Stephen Girard, as and for a republication of his last will and testament, and a further direction in relation to the real estate therein mentioned, in the presence of us, who, at his request, have hereunto subscribed our names as witnesses thereto, in the presence of the said testator, and of each other, June 20, 1831.

“S. H. CARPENTER,

“L. BARDIN,

“SAMUEL ARTHUR.”

“On the 31st December, 1831, the will and codicils were duly proved before the Register of Wills for the city and county of Philadelphia, and on the same day letters testamentary were granted to the executors.

“The defendants are in possession of all the said real estate. The deeds granting the estate mentioned to the said Stephen Girard are to be considered as part of this case.

“If the court shall be of opinion that the said real estate, or any part thereof, was devised by and passed under the said will

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[*328] and codicils *to the defendants, then the judgment to be entered for the defendants, for the whole or such part of the said estate as was devised and passed.—If the court shall be of opinion that the said real estate, or any part thereof, was not devised by and did not pass under the said will and codicils, then judgment to be entered for the plaintiffs, for one undivided third part of the real estate, in the agreement mentioned, or for one undivided third part of so much thereof as was not devised by the said will and codicils, to the defendants.”

When the cause was called up for argument at December Term last, *Kittera* (with whom was *Broome*,) for the plaintiffs contended, that the real estate, which was the subject of these ejectments, having been acquired by the testator, after the date of the last codicil to his will, did not pass to the defendants. There is no doubt that the testator intended by his residuary clause, to make a disposition by will, of the real estate he might acquire afterwards, but there is as little doubt, that he was incapable of doing so in the manner in which he attempted it. Where the intention of the testator is consistent with the rules of law, it is an important guide in the construction of a will, but if it be in opposition to the law, it is no guide. In England and in almost every state in the union, the rule is settled beyond all doubt. There is no discordant opinion on the subject, and being so settled, no practical inconvenience can arise, unless it be that men may be frequently required to review their testamentary dispositions. The right of devising lands in England, is derived from the stats. 32 and 34 H. 8, and until the act of 1705, (Purd. Dig. 876,) in Pennsylvania, the only authority for such devises, was that of the statutes of wills. By that act, these statutes are not supplied, but a mere provision is made as to the mode in which wills shall be proved. A will is considered as a conveyance, or an appointment to a use, and can only operate on land of which the testator is seized at the time the will was made. 2 Bl. Com. 12, 375; 1 Williams on Ex. 6; *Arthur v. Bokenham*, 11 Mod. 148; 1 Saund. 277, n. 4; *Wind v. Jekyl*, 1 P. Wms. 575; *Harwood v. Goodright*, Cowp. 90; 7 Ba. Ab. 306; *Butler v. Baker*, 8 Vin. Ab. 64, case 2; s. c. 3 Co. 25; *Brunker v. Cook*, 11 Mod. 106, 127; s. c. Salk. 237; s. c. Fitzgib. 225; 2 Eq. Ca. Ab. 295; 3 Br. P. C. 19; *Roberts on Wills*, 16, 300; *Swift v. Roberts*, 3 Burr. 1497; *Holt*, 236, 243, 246, 248, 746, 747; *Burke v. Young*, 2 Serg. & Rawle, 383, 389; *Walker's Case*, 3 Rawle, 237; 2 Penn. Bl. 150; 4 Kent's Com. 497; *Minuse v. Cox*, 5 Johns. Ch. R. 450; *M'Kinnon v. Thompson*, 3 John. Ch. R. 307; *Smith v. Edrington*, 8 Cranch. 68; *Turpin v. Turpin*, 1 Wash. R. 75; *Hyer v. Shobe*,

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2 Mun. 200; Kendall *v. Kendall*, 5 Mun. 272; 7 Harris & John. 320; 1 Murphy, 258; 1 Taylor, 305; Livingston *v. Newkirk*, 3 John. Ch. R. 315; Jackson *v. Potter*, 9 John. R. 312; Hays *v. Jackson*, 6 Mass. R. 156; Arndt *v. Arndt*, 1 Serg. & Rawle, 264; 4 Ba. Ab. 427-320.

At the conclusion of Mr. Kittera's argument, no counsel appearing *to argue the cause on the part of the defendants, it was continued until this term, when— [*329]

Scott and T. Sergeant, for the defendants, after observing that their clients, being trustees, were bound not to surrender any portion of the estate of the late Mr. Girard, unless the law required them to do so, argued that the property in question passed by the residuary devise in his will. That it was his intention to dispose of the whole of the estate of which he might be the owner at the time of his death, it is impossible to doubt. It is not only manifested by the residuary clause itself, but is declared in express terms in both the codicils. But it is said, that this intention, however manifest, cannot prevail, because it is inconsistent with a rule of law. The question then is, whether this rule is the law of Pennsylvania. No light is to be derived from the decisions in other states, because the subject-matter of inquiry is entirely of statutory creation. The power to bequeath even personal property is not a natural right, and in England was anciently restricted to two-thirds of the testator's movables. 2 Bl. Com. 12. Except by particular custom lands could not be devised until the year 1540, by virtue of the stat. 32 H. 8, Shep. Touch. 420.

It is, therefore, no part of the common law brought from England by our ancestors, and which was to continue the law of Pennsylvania, until it should be altered by express enactment. Being of statutory creation, the question is merely one of statutory construction. But as the rule relied upon, is derived from England, and it has sometimes been said that the stat. 32 H. 8, extended to Pennsylvania, it is proper to examine that statute and the rules under it as they exist in England, to compare it with our own enactments, and to inquire, what has heretofore been said or decided on the subject. It arose from feudal causes, that lands were not devisable at common law. 7 Ba. Ab. 305; 1 Eq. Ca. Ab. 401. The feudal tenures continued until the year 1660, when they were changed by stat. 12 C. 2, ch. 24; 2 Bl. Com. 76, 77. All enactments, therefore, prior to that time, and all constructions of acts of Parliament, would preserve the taint of this original sin, and hence perhaps, the rule in question grew up. The statute of wills gives to all persons having or that may thereafter have socage lands, the power to

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devise them, and to all persons having lands held by knight service, the right to devise two-thirds of them, saving to the king, wardship, primer seisin, &c. The decisions on this statute in the outset turned upon the word, "having," *Butler & Baker's Case*, 3 Co. R. 30, Anno 1590; *Brett v. Rigden*, Plowd. 342. Subsequently, a will was put upon the footing of a conveyance to uses. *Arthur v. Bokenham*, 11 Mod. 149, Anno 1707; *Brunker v. Cook*, Ib. 122. The right to devise was, therefore, strictly construed upon feudal principles, and for the sake of the heir. *Vaugh. R.* 262. Even in England, however, the construction of this statute has been gradually ameliorated. Contingent remainders and all contingent estates in lands are [*330] now held to be devisable; in opposition *to the opinion which formerly prevailed, that they did not pass by a will made previous to their vesting. 4 Cruise, tit. Devise, c. 3, s. 17; *Fearne*, 366, [289]; *Selwyn v. Selwyn*, 2 Burr. 1131; *Roe ex dem. Perry v. Jones*, 1 H. Bl. 32. The cases which support the rule contended for by the counsel for the plaintiffs, are those of acquisitions not anticipated by the testator. But where the future possession of the property is anticipated, it does pass; as where land is contracted for previous to making the will. *Prideux v. Gibben*, 2 Ch. Ca. 144; *Davie v. Beardsham*, 1 Ch. Ca. 39; *Acherly v. Vernon*, 9 Mod. 68; *Lingen v. Sowray*, 1 P. Wms. 172; 2 P. Wms. 169; *Pullen v. Ready*, 2 Atk. 592. So, where the contract failing a like sum is ordered to be invested in other lands for the devisee. *Whittaker v. Whittaker*, 4 Br. Ch. Ca. 31. So, though the will be made before the period at which, by the contract, the lands are to be passed and delivered. *Greenhill v. Greenhill*, 2 Vern. 679; *Potter v. Potter*, 1 Ves. 437. The last case is emphatically put upon the clear intent of the testator, to die testate as to every part of his estate, and is very analogous to the case at bar.

The question as to decision at least, is an open one in Pennsylvania. The settlement of the province under the charter granted in the year 1681, in the 33d year of the reign of Charles II. was after feudal tenures had ceased in England. It was granted to Wm. Penn in free and common socage. The right to devise lands was assumed and taken for granted by the settlers. At this early period, there was no occasion for any refinement in the law, in relation either to conveyances or to wills. Titles were then inchoate, and some of them for more than half a century were considered personal property. The act of 1705, [1 Sm. L. 33,] was then passed, and became the law of last wills. There was no occasion for the adoption of the stat. 32 H. 8, and accordingly, it is not reported as in force by the judges. This act assumes the power to devise as an

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existing, unqualified right, and does not restrict it to persons having lands, and puts the exercise of it, upon the same footing, as to both real and personal estate. If the intention had been to refer to or adopt the statute of H. 8, it would have appeared in the act, which however has nothing in it like a supplement or law in *pari materia*. How are the words "thereby given or devised," to be construed except as giving and devising all that the will says it does, for the law says, it "shall be available" for that purpose. To say otherwise, would be to reject the words of the act, which the court have no right to do. If it be said, how can a man give that which he has not, the answer is, that this creates no difficulty as to personal property, even in England, and by our act of assembly, real and personal property are, as to the power and mode of testamentary dispositions, treated exactly alike. One hundred and twenty-eight years have elapsed since our act relating to wills, and there has been no decision in opposition to the reading now given of it. A few loose *dicta* only are to be found, which an examination of the cases in which they occurred, will show to be entitled to little *consideration. On the other hand, there are cases [*331] on analogous subjects, adverse to this principle. A grantor out of possession may make a legal transfer of his estate. *Stoever v. Whitman*, 6 Binn. 416. A testator may devise land of which he has been disseised. *Humes v. M'Farlane*, 4 Serg. & Rawle, 435. These are encroachments upon the law of England, which is the other way. 2 Touch. +28, No. 13. But we live under a different meridian from that of England, and many of their rules of law have not been adopted, because they are inapplicable to our form of government, local institutions, habits, and manners. *Steinhauer v. Witman*, 1 Serg. & Rawle, 448, per Duncan, J. What may be the rule in other states is of little consequence. It depends upon their own enactments, or their adoption of the English statutes, and accordingly the rule of one state differs from that of another.

There is, however, another obstacle to the plaintiffs' recovery. They are legatees under the will, the provisions of which they are endeavouring to defeat. They must elect to abandon either the after-purchased property, which the testator has expressly declared, shall pass, or their legacies. They cannot take both under the will, and against it, and the court have the power to put them to the election. Sug. on Vend. (Ingraham's ed. 1820) 138; Sug. on Powers, 380; *Brown v. Ricketts*, 3 John. Ch. R. 553; *Noys v. Mordaunt*, 2 Vern. 581; *Streatfield v. Streatfield*, Talb. 176; *Cauffman v. Cauffman*, 17 Serg. & Rawle, 24; 1 Swanst. Ch. 435; 13 Ves. 220.

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Sergeant, in reply, (*Chauncey* was with him).—A short review of the history of legislation in Pennsylvania in reference to last wills will show, that a distinction has always been kept up between real and personal estate. The sixth section of the charter granted by Charles II. to William Penn, on the 4th March, 1681, declares, “that the laws for the regulation and governing of property within the said province, as well for the descent and enjoyment of lands, as likewise for the enjoyment and succession of goods and chattels, and likewise as to felonies, shall be and continue the same, as they shall be for the time being by the general course of the law in our kingdom of England, until the said laws shall be altered by the said William Penn, his heirs or assigns, and by the freemen of the said province, their delegates or deputies, or the greater part of them.” At the date of the charter, any will in writing was good in England to pass personal property, but to make a valid testamentary disposition of lands, the formalities prescribed by the statute of frauds, 29 C. 2, c. 3, were required. That statute was passed in the year 1676, and took effect on the 24th June, 1677. Before the proprietary and the adventurers concerned with him left England, certain laws were agreed upon on the 5th May, 1682, the fifteenth of which provided, that all wills and writings attested by two witnesses shall be of the same force as to lands as other conveyances, being legally proved within forty days, within or without the province. Prov. L. Appx. 4. The 45th chapter [*332] *of the laws passed at Chester on the 7th December, 1682, (Prov. L. Appx. 7,) was a re-enactment of the law just stated, and this act as amended by the act of 1705, 4th Queen Anne, (Prov. L. 30,) remains in force to this day. Among the laws passed at New Castle between the 14th of October and the 27th November, 1700, (Prov. L. Appx. 17,) it is enacted that, to the end that lands and hereditaments may be enjoyed by the devisee and his heirs, as amply as lands granted by deed to the grantee, all wills in writing wherein or whereby any lands, tenements, or hereditaments within this province or territories, are or shall be devised, shall be as good and authentic in law according to the tenor thereof, as any other conveyance for granting of such lands and premises, whether the said wills be made within or out of this province or territories. This act was repealed in council, and the act of 1705 passed to supply its place. Thus it appears that no provincial legislation was deemed necessary on the subject of wills of personal estate, and therefore all the laws passed during a period of more than twenty years, relate wholly to wills of real estate, which, as well as testaments of chattels were previously governed by the law of England. It is to be observed, however, that all these laws ex-

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pressly put such wills on the footing of conveyances. They alter the law as regards the proof of the instrument, but not as to its nature, as it was understood before. The respect paid by the proprietary and our early legislatures to lands, was greater than seems to be imagined. Personal estate was always the primary fund for the payment of debts, and originally the whole of a debtor's lands could not be applied even as an auxiliary for that purpose. By the laws agreed upon in England, sec. 14 (Prov. L. Appx. 4,) it is declared, that all lands and goods shall be liable to pay debts, except where there is legal issue, and then all the goods and one-third of the land only. This provision was altered by the law passed at Chester, December 7th, 1682, (Prov. L. Appx. 7,) which made all the goods liable for debts, and where there was legal issue, one-half of the lands. By the law passed at Philadelphia on the 10th May, 1688, to continue in force one year, (Prov. L. Appx. 10,) all a debtor's lands were made liable for his debts, and this was made perpetual by an act passed 1st June, 1693, (Prov. L. Appx. 14.) Nor was there always a full power of alienation by will. By an act passed 1 March, 1683, (Prov. L. Appx. 9,) one-third of a man's estate is directed to go at his death to his wife, one-third to his children equally, and the other third "as he pleaseth." The act of 1 June, 1693, (Prov. L. Appx. 13,) provides, that if the personal estate be sufficient for the payment of debts, "all a testator's real estate shall be invested and remain as their last wills and testaments devise the same," and the act of 1697, (Prov. L. Appx. 14,) contains the same provision. This brief review of the early laws shows the marked distinction always kept up between real and personal estate. But this distinction is not peculiar to the common law. It is founded in the nature of things. In the civil law and in all the codes derived from it, there is the same distinction between *mobilia* *et *immobilia*. If this doctrine be correctly understood, then the intention of the testator is immaterial, [*333] for it cannot be legally executed. There is a wide distinction between an intention to do a thing and an intention to do it by the will. With this distinction Mr. Girard was familiar, as is clearly shown by the two codicils made for the purpose of passing real estate which he had acquired after his will was made. He intended to do what was necessary in order to vest in the defendants the estate he might afterwards purchase, but omitted to carry that intention into effect in the manner the law required, and consequently his intention is no more available than if he had intended to make a will, but had neglected to do so. It is the act and not the intention, that makes a testamentary disposition. A will derives its efficacy entirely from the law, a want

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of conformity to which renders it nugatory. If it be not in writing, or if it be proved by only one witness, it is no will, whatever may have been the intention of the party who supposed he was disposing of his property by will.

When Mr. Sergeant had gone thus far in his argument, he was stopped by the court.

The opinion of the court was delivered by

GIBSON, C. J.—In the report of the judges on the statutes, nothing is said about the 32 and 34 Hen. 8, which are therefore to be taken as not in force here; but whether they were considered as having never been so, or as supplanted by our statute of 1705, cannot be positively known. They were most probably thought to be repealed and supplied, as they were entirely within the rule laid down by Lord Holt in *Blankard v. Galdy*, 2 Salk. 411, and repeated by the Privy Council, as appears from the relation of the Master of Rolls in 2 P. Wms. 75; that an emigrant colony carries with it the laws of the parent to an uninhabited country; or even to one acquired by conquest, so far as regards matters in respect to which the existing laws are silent, or enjoin what is immoral, or are contrary to the religion of the conqueror. It is plain that a country whose entire population has been displaced to make room for the new comers, is an uninhabited country for the purpose of receiving their laws; and therefore it seems singular, that the distinguished judge who ruled *Blankard v. Galdy*, should shortly afterwards have held, in a case which involved the legality of slavery, that the laws of England did not extend to Virginia, being a conquered country; and the more so, as the laws of the aborigines, if they had any, could not be supposed to have provided for the subject. Be that as it may, our courts have always held that the laws which were in force at the foundation of the colony, and not positively unsuitable to the condition of the colonists, were brought by them hither; and it cannot be thought that laws which enabled them to dispose of real estate, were unsuitable. During the twenty-four years that elapsed between the charter and our statute, they could not have been without provision on the subject, and I know of none that was competent to satisfy their necessities but these very statutes; for it will appear in the sequel, that the intervening *legislation on the subject of wills, had regard to the proof of the instrument and not the power of the testator, with perhaps the single exception of the act to direct “how the estate of any person shall be disposed of at his death,” passed the 10th of March, 1683. By that act, which may be seen in the Appendix to Hall & Sellers’s edition of the laws, page 9, it was provided: “that whatsoever estate any person

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hath in this province or territories thereof, at the time of his death, unless it appear that an equal provision be made elsewhere, shall be thus disposed of; that is to say, one-third to the wife of the party deceased, one-third to the children equally, and the other third as he pleaseth; and in case his wife be deceased before him, two-thirds shall go to the children equally, and the other third to be disposed of as he shall think fit, his debts being first paid." In the margin we have these observations by Chief Justice Kinsey: "1. This act seems to restrain the power of devising more than one-third of the lands of which a man died seized. 2. This law, for aught I find to the contrary, continued till the first of the fourth month, 1693, when a law passed authorizing a man to devise all his real estate." This repealing law I have been unable to find. But it is observable that the act of 1683, included land, if at all, only by force of the word "estate" and not of any more specific term: so that it is by no means clear that the inclination of Judge Kinsey's opinion, for he spoke doubtingly, accorded with the true construction or actual understanding of the times. He could not have known by experience the construction put on the act in practice, for his notes were written probably forty years after the repeal of it; and if he had been a member of the profession during that period, he was not till 1730, an inhabitant of Pennsylvania. Granting his opinion to be that land was included, it is pretty evident the crown thought otherwise; for judging from the jealousy evinced by it in the case of much less important innovations, it is scarcely to be believed, that it would have tolerated for ten years so violent an infraction of the spirit of the charter, which required a conformity of the laws to those of the mother country, as a restriction of the power of devising to a third of the testator's land, or the dower of his widow to be turned to a fee. But if it were even applicable to land, still it was viewed by the Chief Justice but as a restraining statute, not an enabling one; and this plainly shows what, in his opinion, was the law before. It was therefore to remove a doubt of the interpretation, or to repeal the law taking the interpretation of the Chief Justice to have been established—in any event to restore the law to its former footing—that the act of which he speaks, was passed in 1693. Of the legislation which took place in relation to proof of the instrument, I shall have occasion to speak in the sequel. It seems pretty clear, then, that the English statutes of wills were originally in force with us, and not reported as being so still, only because the judges thought that our own statute was designed to supersede them in their whole extent. Judging of the substitute by its provisions, it might perhaps

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[*335] as naturally have *been deemed but ancillary to them, as performing the same office in regard to them here, by exacting in addition to their requirements the observance of particular solemnities as matter of proof, that is performed by the statute of frauds in England. But even as an enabling statute, our act of 1705 was not a new law, but an act of legislation on the basis of an old one, which is therefore to be taken into consideration in the interpretation of inexplicit clauses, because it is reasonable to presume that no departure from the existing law was intended, further than is expressed. For this reason it is, perhaps, that the act has always been understood by the profession, in accordance with the British statutes. Had a variance been suspected, it must long ago have been put to the test of judicial decision; but no trace of such suspicion is to be found in our judicial records. It is argued, that whatever the general rule may be, the clauses in the codicils of this will, which require real estate acquired subsequently, to pass as if it were then the estate of the testator, make the case an exception to it; and the question therefore is not one of intention, but of power. But even in the case of a general residuary devise, the intention to pass the estate is taken for granted; and what is there in the specific expression of such an intention here, but a greater degree of certainty in respect to what is in other cases taken for granted? Nothing in the books but the *dictum* in Brett v. Rigden, Plowd. 344, gives colour of authority to the supposed distinction. There it is said to have been determined in the 39 H. 6, 18, that if a man devise a certain estate, and have nothing in it at the time, but purchase it afterwards, it shall pass; because, as it is said, it must be taken that his intent was to purchase it, and were it not to pass, the will would be void. All this was repudiated by Lord Holt in Bunker v. Cook, 11 Mod. 278, (s. c. Fitzg. 225,) as being not even the *dictum* of a judge, but an assertion of counsel, and unwarranted by the book cited for it; in which he is supported by Chief Justice Trevor, in Arthur v. Bokenham, 11 Mod. 163; (s. c. Fitzg. 233.) In truth the matter never depended on the actual intent; nor yet, as it was at one time supposed, on the restrictive words of the English statutes, and it is therefore of no importance to the question, that those statutes were not reported as in force here. It is true that in Butler & Baker's Case, Lord Coke laid great stress on these words; but in Bunker v. Cook, or Broncker v. Coke, as it is reported in Holt's Rep. 247, it was asserted by Lord Holt, that Chief Justice Bridgman had differed from Lord Coke in attaching importance to them, in a case determined in the Common Pleas, the 16 Car. 2, and that the judges in the exchequer chamber were of the

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same opinion: this too on the relation Chief Justice Bridgman himself. But what puts the matter at rest is, that in this case of *Bunker v. Cook*, the rule was applied in all its rigour to lands which were devisable, not by force of the statute at all, but by custom; and the judgment was affirmed in the House of Lords. The doctrine was vigorously maintained in that case, as well as in *Buckenham v. Cook*, *Holt's Rep. 248, [*336] by Lord Holt: and in *Arthur v. Bokenham*, by Chief Justice Trevor, who together rested it on these propositions: That a will is a species of conveyance, not strictly subject to the rules of conveyances at the common law it is true, the vesting of the estate being postponed till the death of the testator; yet operating, as regards his disposing power and capacity, by relation to the making of it, insomuch as to require his power over the estate to be perfect at the time, just as his capacity must be perfect at the time, it being settled that the want of a disposing mind and memory at the performance of the act of disposition, is not supplied by the restoration of it before the death, for the same reason that an intervening loss of it will not prejudice a disposition unexceptionable at the time—in other words, that the act of disposition must be complete in every respect at the performance of it: That a testator, like any other grantor, cannot give what he has not; and that the same principle prevails in conveyances to uses, though construed liberally like wills, to favour the intention, as in *Yelverton v. Yelverton*, Cro. Eliz. 401, where a father covenanted to stand seized of land which he should purchase: That the form of pleading a devise, the testator always being described as seized at the time of making his will, is strong though not conclusive evidence of the necessity that he should be so in fact: That the reason why land differs in this respect from personal estate, is that the common law has provided in the event of intestacy, a fixed successor to the one and not to the other, even the statute of distribution being but a direction to the executor how to administer the assets; by reason of which, and the fluctuating nature of personal estate, which is changing every day, a different rule would require a new will to be made every day: That a subsequent purchase giving the land to the testator, is repugnant to the import of the devise, which would give it to the devisee; and therefore not to be intended to have been made in subservience to the object of the will: And finally, that there is no case or authority to warrant the opposite doctrine. To the argument of such men as these, it would be presumptuous in me to attempt an addition, and I therefore refer the student to their reasons as stated in the report. The alleged dependence, then, of the doctrine on the restrictive words of

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the British statutes being disposed of, it results that the question stands here exactly as it did in England, unless the specific provisions of our own statute be thought to make a difference.

The clause which has been supposed to make this difference, is in the first section. After requiring proof by two witnesses, and establishing a mode for its authentication, it is declared that wills so proved, "shall be good and available in law for the granting, conveying, and assuring, of the lands or hereditaments thereby given or devised, as well as of the goods and chattels thereby bequeathed;" and from the parity of provision thus expressed, is inferred an intention to create a parity of operation and effect. That such was not the object, seems [*337] manifest from the legislation which preceded it. By *the fifteenth law agreed upon in England, it was declared, that "all wills and writings attested by two witnesses, shall be of the same force as to lands as other conveyances, being legally proved within forty days, either within or without the said province." This was evidently designed to preclude that provision of the statute of frauds which requires three witnesses, and is worthy of special notice beside, not only for treating wills of lands as conveyances, but for putting them on the footing, as to proof, of testaments of chattels, which by the canon, and consequently by the English law, require but two. *Lea v. Libb*, 3 Salk. 396. This fundamental law received a regular statutory form from the first assembly, convened at Upland, in 1682, by whom it was enacted as the forty-fifth section of the Great Law, and in the terms in which it had been expressed in England, with the exception of two immaterial words introduced, the last of them evidently by inadvertence. Chief Justice Kinsey's note in the margin is: "This act as amended in the fourth of Queen Anne, remains to this day." *Prov. Laws*, App. 7. Now, the fourth of Queen Anne, which he pronounces but an amendment, is the very act under consideration; and it seems clear, therefore, that he considered the act of 1682, as the law of his day, except so far as it was amended by the act of 1705. His notes were written certainly after 1713, as they contain a reference to acts passed in the close of that year, and probably after 1730, when he removed from New Jersey to Pennsylvania. He was appointed chief justice about the year 1743, and died in that office, according to Proud, in 1750. The act of 1682, however, was amended only as to the time of proof, and the manner of authenticating it, the requisition of two witnesses being preserved. But this is not all. An act had been passed at New Castle, in 1700, (*Append. to Prov. Laws*, 7,) which expressly following the analogy of conveyances as to the effect of the instrument, required no more than legal

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proof without specifying the number of the witnesses. It therefore had, or might be supposed to have, the effect of putting wills of lands upon a lower footing as to proof than wills of chattels, about which it said nothing, and consequently left them on the footing of the general law. To say the least, it was open to an argument that one witness was sufficient for a will of land, as in the case of any other conveyance of land. This act having been repealed by the Queen in council, as may be seen in Weis & Miller's edition of the laws, page 18, our present act was passed in the same year, and the requisition of proof by two witnesses restored, with new provisions added, as to the mode of authenticating it; and thus the reduction in the quantity of proof made by the act of 1700, was taken away, and wills of land were again put, as to proof, on the footing of testaments of chattels. It is needless to ask why. It was an express condition of the charter, that the laws for the regulation of property should conform, as nearly as might be, to the laws of England, till altered by the provincial legislature; and the same jealousy of innovation, which prompted the crown to repeal the act for the abolition of survivorship *between joint tenants, passed in 1700, as well as the two acts [*338] for barring entails by a deed acknowledged and recorded—the one passed in 1705, and the other in 1710, (Hall & Sellers's edition of the laws, Append. 18, 19,)—might, on a question of further departure from the statute of frauds, induce it to stickle about a witness more or less. The clause in our statute of wills, to which I have particularly adverted, seems therefore to have reference to the proof, and not the effect of the instrument, or, at least, no further than the latter may be supposed to depend on the former. The first was all that was in contest between the province and the crown. The fifteenth law agreed upon in England, or rather the act of 1682, remained in force twenty-three years without opposition; and during that time, wills of lands and testaments of chattels stood on the same footing. But no sooner did the act of 1700 reduce the proof of the former, or bring it into doubt, than it was repealed by the privy council; and when the present act of 1705 raised it again to the level of the act of 1682, the crown acquiesced. At no time does there appear to have been a disposition to change the effect of a will of lands as understood in England; indeed, the very suspicion that such a design was harboured, would have defeated it. On the contrary, the language of all our laws is incomparably more emphatic than that of any act of Parliament, to show that a will of lands was esteemed a conveyance and no more. In the very act before us, a will proved in the manner prescribed is declared “to be available

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in law for the granting, conveying, and assuring of the lands or hereditaments thereby given or devised"—words that are properly predicable only of conveyances of land by deed; and though they are used in the same clause as predicable of the transfer of chattels also, they are so used, as regards the incidents peculiar to each, *reddendo singula singulis*.

This sketch of the legislation which preceded the act of 1705, and which is here given in the order, and nearly in the words of a distinguished counsel, to whose research I am indebted for it, seems to put the intention of the legislature beyond the reach of doubt. The magnitude of the interest in contest, amounting as it does in value to more than sixty thousand dollars, as well as a respect for the doubt suggested by my brother Huston, has induced me to examine the foundations of this part of our law with peculiar care; and the result is a firm conviction, that the real estate acquired subsequently to the two codicils, did not pass by Mr. Girard's will: consequently, the plaintiffs are entitled to the succession under the intestate laws.

Judgment for the plaintiffs.

Cited by Counsel, 5 Wh. 383; 7 Barr, 412; 10 Barr, 88; 3 H. 476; 8 C. 396; 11 C. 399; 14 S. 222.

Affirmed, 1 Wh. 251.

Cited by the Court, 5 R. 86; 1 Wh. 505; 5 W. & S. 199; 10 H. 421.

END OF MARCH TERM, 1833.—EASTERN DISTRICT.

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT—DECEMBER TERM, 1833.

[PHILADELPHIA, JANUARY 11, 1834.]

Bennett *against* Bittle and Another.

IN ERROR.

A demise or conveyance of a "barn," without other words being superadded to extend its meaning, will pass no more land than is necessary for its complete enjoyment.

Any entry by the landlord on the premises demised, against the will or wishes of the tenant, is not an eviction in point of law, which will suspend the rent. But if the landlord ejects, expels, evicts, or turns out the tenant, and prevents his enjoyment of the premises for which the rent is payable, the rent will be suspended; and whether there has been such an eviction, in point of fact, is a question for the jury.

ERROR to the Court of Common Pleas of *Delaware* county.

In the court below, an action of *replevin* was brought by Lewis Bennett, the plaintiff in error, against William Bittle and Josiah Moore, the defendants in error, in which Moore made cognizance as the bailiff of Bittle, who avowed for rent in arrear. The plaintiff replied, no rent in arrear, and an eviction of part of the premises leased.

On the trial, the defendants gave in evidence a lease from William Bittle to Lewis Bennett, dated the 9th of February, 1830, of which the following are the material parts:

"Be it remembered, that William Bittle has leased to Lewis Bennett, the messuage, tenement or tavern-house, barn, sheds,

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&c., with four lots of land, on the north-east side of the Westchester road, in the township of Haverford, and county of Delaware, known by the name of the Spread Eagle Tavern, to hold the same for one year from the first day of April next ensuing, the said Lewis Bennett yielding and paying to the said William Bittle, the rent or sum of three hundred and seventy-five [*340] dollars, together with the price of the license *for keeping the public house, and all the taxes that may be levied upon the said premises for the year 1829. It is further agreed to pay the rent half yearly.

After having proved that Bennett went into possession of the premises, under this lease, soon after the middle of April, 1830, and remained in possession until the last of March, 1831, the defendants closed their case.

The plaintiff then examined several witnesses, from whose evidence it appeared, that about the 1st of May, 1830, two men and a boy employed by Bittle, hauled manure out of the barnyard. They were hauling it the greater part of one day, and they afterwards returned to haul more. Bennett was not at home on the first day. He afterwards reproved Bittle for taking away the manure, who replied, he would do as he pleased. Some further dispute then took place between them. Bittle also turned cattle into the barn lot; one day seven, and the next day ten, and kept them there more than two weeks, putting them in in the morning, and taking them out at night. Bennett forbade his putting cattle into the lot, and told him he should charge him the same that he did for drove cattle. Bennett used the barn and lot, but each insisted that they were his. Bittle asserted that they were excepted from the lease, which the other denied. Bittle on one occasion said, that Bennett had put up the bars, and four of the cattle were out, and three in the field, and he would make Bennett find them. The latter answered, that he would not find them, but would charge him for those that were in the field. Bittle said, that if he had rented the lot to Bennett, it was his, and the witness added, that Bennett had convinced Bittle that the lot was his, and he agreed that Bennett should take out the cattle and drive them home. On the same day, Bennett took the cattle out of the lot, and put them into Bittle's field over the road.

In a conversation between Bennett and a witness, in reference to the lease, he stated, that he did not get a foot of land on that side of the road on which the barn lot was situated, except half the barn. At another time he stated to the same witness, that he would like to rent the barn field to Bittle, but he could not spare it; he wanted it for pasture. Bittle put a fence across it either in April or May, 1830, but after the dung was hauled

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away, Bennett had possession of it, and continued to occupy it until the expiration of the lease. The lot in question contained about eleven acres.

Other evidence was given on both sides, tending further to show the understanding of the parties, as to what was intended to be embraced by the lease, which it is unnecessary to state.

When the evidence was closed, the president judge delivered to the jury the following

CHARGE.—“On the question, what premises were leased by Bittle to Bennett, it has been broadly urged, that by the terms of the contract, and the legal interpretation of the lease, by the term barn, the *lot or field in which it stood, [*341] passed. Although the attention of the court has not been asked, it is proper to say, that I do not think that necessarily follows. All contracts are to be construed according to their subject-matter:—If the late Mr. Anderson had leased a house and two lots on the east side of the road, and the barn on the bank of the creek, it does not follow that the field in which it stands is also leased, but at most a passage to it.

“In the course of the argument the court has been asked by the plaintiff’s counsel to instruct the jury, ‘That any entry on the premises demised against the will or wishes of the tenant, is an eviction in point of law, and suspends the rent,’ I cannot so instruct the jury. If such were the law, and if Mr. Bittle had entered the tavern of Mr. Bennett, after having been forbidden—had walked over his field, or without leave had walked into the little orchard and carried away a basket of apples or fine peaches, or in short committed any other trespass, it would, according to this position, be an eviction, and suspend the whole rent. But the law is not so; in this, as in every other instance, it is more consonant to reason; it declares, that if the landlord takes the high-handed measure of entering upon the lands he has leased to his tenant, and ejects, expels, evicts, or turns out the tenant, and prevents him from enjoying and using the land, or a portion of it, which he had solemnly leased to him, thus preventing the tenant’s enjoyment of the premises, in respect of which rent was to be paid, that would be an eviction which would suspend the rent; so that the inquiry with this jury will be whether Bittle did eject from, and dispossess Bennett, and thus evict him of any particular portion of the premises really demised to him, and for which the rent was to be paid; or whether Bittle merely did other wrongs short of eviction and expulsion, such as trespasses in the field or barnyard. If the former, the rent for that half year is wholly suspended; and if the latter only, it affords the tenant no such defence.”

The plaintiff excepted to the charge of the court.

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The following specification of errors was assigned in this court :

"1. The court erred in charging the jury, that the lot in which the barn stood did not pass by the terms of the contract, and the legal interpretation of the lease.

"2. The court erred in refusing to charge the jury as requested by the plaintiff's counsel, upon the question of eviction.

"3. The court did not instruct the jury correctly upon the legal operation of the lease, and improperly restricted their inquiry upon the question of eviction under the evidence given in the cause.

"4. The court erred in charging the jury that there must be an absolute expulsion, or turning out of the tenant to constitute an eviction, and they should have left it to the jury to decide whether the acts proved, did or did not constitute an eviction in point of law."

The cause was argued by *Edwards* for the plaintiff in error, and by *Tilghman* for the defendants in error, after which

[*342] *The opinion of the court was delivered by
KENNEDY, J.—The first exception is, that "the court erred in charging the jury, that the lot in which the barn stood did not pass by the terms of the contract, and the legal interpretation of the lease." The president judge is not fully represented, I think, by the terms in which this error is assigned, in what he said to the jury on this point. The words of his charge are: (his Honour here stated the words of the charge.) In this, I think, he was certainly right. And it would require, I apprehend, a case connected with peculiar and special circumstances to be made out by evidence, in order to make the lease of a barn, by the word "barn," without more, carry with it also a lease of eleven acres of land, with which it happened to be inclosed. The word "*domus*" or "house," which, although adjudged to be *nomen collectivum*, 4 Leon. 16, has been said where it was used in a devise thereof, without the addition of the words "*cum pertinentiis*" not to be sufficient to pass the garden and curtilage. 2 Ch. Ca. 27; Kielway, 57. And in Moore, 24, pl. 82, a grant of a messuage which was formerly thought to be of more extensive signification than the word "*domus*" or "house," was held to include and pass nothing but the house and circuit of the house. This however may be going too far, because the curtilage and garden have been considered as parcel of the house, and therefore will pass by a demise or conveyance of it, without the words "with the appurtenances," being added. *Carden v. Tuck*, Cro. Eliz. 89; s. c. Leon. 214; *Hill v. Grange*,

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1 Plowd. 171; Smith v. Martin, 2 Saund. 401, and note (2). And in the case of a grant or demise of a house with the appurtenances, it seems to be established as a general rule, that no more than the garden, orchard, curtilage, and yard adjoining the house will pass with it, although other lands have been occupied with the house. Blackburn v. Edgley, 1 P. Wms. 603; Smithson v. Cage, Cro. Jac. 526; Betsworth's Case, 2 Co. 32; Co. Lit. 5 b, 56 a, b; Hill v. Grange, 1 Plowd. 171; 2 Saund. 401, note (2). But see Cary, 24, where a messuage was demised (*cum pertinentiis*), and certain lands had been previously occupied therewith for the same rent and by the same words, and by advice of the judges Lord Chancellor Bromley decreed, that the land should pass also. But the word "barn" is still of more limited signification than that of "house," and a demise or conveyance of it without other words superadded to extend its meaning, would pass no more land than would be necessary for its complete enjoyment. In Archer v. Bennett, 1 Lev. 131; s. c. 1 Sid. 211, it was held, that a conveyance of "mills *cum pertinentiis*" did not pass the close on which they stood. There is certainly no good reason why a close, in which a barn stands, should pass by a grant of the "barn *cum pertinentiis*," more than for passing the close in which mills stand by a grant thereof *cum pertinentiis*. But in the case before us, the words "*cum pertinentiis*," are wanting, which, perhaps, makes it still more strong against the plaintiff's claim.

*The three remaining errors all relate to the same point, and present but one question, which is, Did the [*343] president judge charge the jury correctly as to what in law constituted an eviction? He was requested by the counsel for the plaintiff to instruct the jury "that any entry on the premises demised, against the will or wishes of the tenant, is an eviction in point of law, and suspends the rent. In reply to this, the president judge told the jury—(Judge Kennedy here repeated the charge in the language of the judge who delivered it.) If the president judge had instructed the jury as the counsel for the plaintiff requested, the charge would have been manifestly erroneous; for an entry on the demised premises by the lessor, against the will, or even against the express prohibition of the tenant, without doing more, does not amount to an eviction, and consequently would not extinguish or suspend the payment of the rent. At most it is only a trespass, for which the tenant may obtain compensation in damages by an action of trespass. In Roper v. Lloyd, T. Jones, 148, which was an action of covenant for the non-payment of rent reserved under a lease for years of a messuage, &c., where the defendant pleaded that after the lease, the plaintiff had separated, pulled down,

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taken and carried away a penthouse, fixed and annexed to the said messuage and part of the premises demised, and detained it, before the rent became due, *et adhuc detinet*, to which the plaintiff demurred, judgment was given for him, "for," as the court said, "this was no suspension of the rent, but a trespass for which the defendant may have his action." So in Harrison's Case, Clayton's Rep. 34, where A. having made a lease of a house reserving rent, afterwards, during the lease, commanded the breaking a partition wall in the house; this was held no such re-entry into the house as will make an extinguishment of the rent; for that must be a continuance of the possession, and putting out the lessee." 18 Vin. Abr. 504, tit. Rent, (A. a,) pl. 11. In Bushnell v. Lechmore, 1 Ld. Raym. 370, in an action of covenant by the plaintiff for rent, and eviction pleaded by the defendant, Lord Holt said, "whether the plaintiff entered by virtue of any power, or whether he was a mere trespasser, if the defendant was not evicted it will be no suspension of the rent." In Reynolds v. Buckle, Hob. 326, in debt for rent, the defendant pleaded, that before the rent became due, the plaintiff entered upon him, but did not say that he expelled him, or held him out, and so issue was taken on *non intravit* and found, according to the report of the case, for the defendant. This seems to be a misprint of the word "defendant," instead of "plaintiff," and so alleged by Lord Holt in the case of Jones v. Boddinger, Comb. 380, who in speaking of it, says, "I take the case of Reynolds, Hob. 326, to be misprinted, for the entry is no bar. Expulsion makes the first part of the bar, and holding out the rest, the book saith. It was found for the defendant, which could not be, the judge must direct the jury otherwise." And again, in Arnold v. Foot, 3 Keb. 453, in debt upon an obligation and agreement to pay twenty shillings a [*344] year for the premises, so long as enjoyed, where the *defendant pleaded entry by the plaintiff before the 24th of June, 25 Car. 2, and before any rent became due, and that an ejectment was brought, and judgment had in Michaelmas term after; to which the plaintiff demurred, because it was not said *expulit* or *amovit*, nor that the plaintiff continued in possession, as it ought to be, being pleaded by way of suspension: but by way of eviction it were well enough, which the court agreed, in case it were payable as a rent.

Mr. Chambers, in his treatise on the law of Landlord and Tenant, lays it down, that "if the lessor enter without ousting the tenant, although he damages the premises irreparably, it will not be a sufficient entry to suspend the rent," p. 591. He refers to some of the cases cited above, and to two others, Cherbourn v. Rye, Cro. Eliz. 341, and How v. Broom, Goulds, 125,

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which do not support his proposition; for Popham and Gawdy, Justices, thought that the entry of the lessor, and his pulling down the house on the demised land, was a suspension of the rent, although the tenant re-entered and enjoyed the land afterwards; but Fenner and Clench, Justices, doubted whether the rent was not revived by the re-entry of the lessee. Lord Mansfield, however, in *Hunt v. Cope*, Cowp. 243, declares that to occasion a suspension of the rent, the rule of law is clear, there must be an eviction or expulsion of the lessee. And it seems to be settled, that if the lessee, after having been evicted by the lessor, re-enters and possesses again the demised premises before the rent becomes due; it is thereby revived. Page v. Parr, Styles, 432; 1 Selw. N. P. 432, 500; *Cibels v. Hills*, 1 Leon. 110. But if the lessor enter and oust the lessee, it is not material whether he (the lessor) continue his possession there or not; for having once entered and expelled the lessee, although he depart presently, the possession is in him sufficient to suspend the rent, until the lessee does some act that amounts to a re-entry. *Cibel v. Hills*, 1 Leon. 110. If the lessor enters and expels the lessee from part only of the demised premises, the latter may abandon and give up the residue; and by doing so, it is clear, that he thereby discharges himself from all liability to pay rent, which otherwise would have become due subsequently. *Smith v. Raleigh*, 3 Camp. 513. But if he should continue to possess and enjoy the residue, I will not say but that he may be made liable upon a *quantum meruit*. *Stokes v. Cooper*, Ib. 514, in note.

It appears, then, from an unbroken chain of authority and decisions, that an entry of the lessor, without an expulsion of the lessee from at least some part of the demised premises, is insufficient to produce a suspension of the rent; it follows, that the court below were right in refusing to charge the jury as requested by the counsel of the plaintiff, and in directing them that nothing short of an eviction or expulsion from at least a portion of the demised premises, would be sufficient for that purpose. Whether an eviction was proved or not, was left entirely as a matter of fact to be decided by the jury, upon which I cannot perceive that the president of the court in delivering the charge, ventured to intimate an opinion. He seems to have met, *very fully and fairly the proposition contended for by the counsel of the plaintiff. And it was perhaps owing [*345] to a conviction resting on the mind of the plaintiff's counsel at the time, that his evidence at most tended only to prove a mere entry by the defendant against the will and consent of the plaintiff, that he was induced to contend as he did, that such an entry amounted in law to an eviction. For if he had conceived that

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his evidence was, under any view that might be taken of it by the jury, sufficient to establish anything beyond such entry, as for instance, an exclusion or holding of the plaintiff out of the possession and enjoyment of any part of the demised premises, he ought to have shaped his proposition accordingly, and to have asked the instruction of the court to the jury in regard to it; and in this way, it is more than probable, some of those things, which it has been alleged on the argument that the court in explanation of what in law amounted to an eviction ought to have told the jury, would have been mentioned by the court to them. But as the proposition of the plaintiff's counsel did not require any such illustration, there was nothing improper on the part of the court in omitting it.

The judgment of the court below is affirmed.

Cited by Counsel, 5 W. & S. 148; 9 S. 422; 19 S. 328; 7 N. 418, s. c. 7 W. N. C. 140; 10 N. 323; 2 W. N. C. 610; 10 W. N. C. 30; 11 W. N. C. 217; 13 W. N. C. 28.

Approved and followed, 4 Barr, 101, and re-affirmed, 2 Wr. 343.

[PHILADELPHIA, JANUARY 14, 1834.]

Ankrim *against* Woodward and Others, Trustees under a Domestic Attachment, &c.

IN ERROR.

In an action by the trustees under a domestic attachment issued against A., brought to recover from B., the father of A., the proceeds of the sale of goods in a store which had belonged to A., and the amount of debts due to A. collected by B., it is competent to the defendant to prove by the testimony of any disinterested witness, admissions, declarations, and acts of A. made or done at any time prior to the issuing of the attachment, tending to show, that he had given to his father the store and books of accounts, towards securing a debt which he owed to his father; notwithstanding A. was examined as a witness on the trial for the father, and testified to nothing having passed between him and his mother (who was alleged to have been his father's agent in this matter) on the subject of the store and books of account, and of his giving them up to his father, for any purpose whatever.

But without any agreement between the father and the son, by which the latter assigned to the former the store, goods, and books of account, if the son before the writ of attachment issued, gave up to the father the goods and books for the purpose of enabling him to satisfy the debt due to him, out of the proceeds of the sale of the goods and the moneys collected, and the father, before the suing out of the writ, accepted them for that purpose, he would be entitled to have his debt satisfied out of the money arising from the sale of the goods and the collection of the debts, whether the debts were collected before or after the issuing of the writ of domestic attachment.

The trustees under a domestic attachment are only invested with those rights which existed in the person against whom it issued immediately before the writ is sued out, unless he before that time assigned or conveyed away his

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estate, or anything belonging to him for the purpose of defrauding his creditors; in which case the trustees have power, under the fifth section of the act of 1807, to recover and dispose of whatever may have been so conveyed away, in the same manner as if he had been seized or possessed thereof at the time of suing out the writ of attachment.

*WRIT of error to the Court of Common Pleas of Chester county. [*346]

In the court below the action was *assumpsit*, brought against the plaintiff in error, Josiah Ankrim, by John Woodward, John Way, and George Gregg, trustees under a domestic attachment issued at the suit of Dennis M'Credy and Samuel Parker, trading under the firm of M'Credy & Parker, against Adam Jenner Ankrim, the plaintiffs below and defendants in error.

The defendant below pleaded *non assumpsit*, and two special pleas of set-off, averring that Adam Jenner Ankrim, prior to the issuing of the domestic attachment, and the trustees, prior to the commencement of this suit, as trustees, &c., were indebted to the defendant in a larger sum than that claimed in this suit.

The replications to the special pleas merely traversed the allegation that the plaintiffs, as trustees, were indebted, &c.

Upon the trial, the plaintiffs, among other things, gave evidence that Adam Jenner Ankrim was a son of the defendant, Josiah Ankrim, and kept store in Jennerville, Chester county, near his father's residence, for about one year, viz.: from September, 1825, to October, 1826, when he left the state, and his father took possession of the store, goods, and books, under circumstances tending to show a misunderstanding between them; that the father afterwards treated them as his own, sold out the goods, and collected some of the debts.

The domestic attachment was issued on the 8th of September, 1827, and this suit commenced on the 23d of September, 1830.

The defendant then proved that Adam Jenner Ankrim was indebted to his father in a large sum of money: That prior to leaving the state, he had married to his father's displeasure: That he continued keeping the store until October, 1826, at which time (according to his own deposition read in evidence in the case) he delivered up the keys of the store to his sister Margaretta Ankrim, for the purpose of having them delivered to his father, that he might convert the effects of the store into the means of discharging the debt he then owed him: That he then resided in New Jersey, and was in business there, and intended to return to that state: That his father did not consent to his going into business as a storekeeper in the first instance, but afterwards became reconciled to it: That he was on such terms with his father, that he preferred delivering the keys to him through the hands of his sister, rather than directly to him-

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self, and that it was his intention that his father should have his books of accounts, to collect the outstanding debts.

He annexed to his deposition a statement showing the debts due to his father, and explained the nature of them. They appeared to have arisen from money lent, and from debts paid by the father for the son. It also appeared that the amount of these debts exceeded the value of the goods in the store, when the father took possession of it.

The defendant's counsel then called as a witness Delia Ankrim, and in connection with the evidence thus given, proposed to ask [*347] her *the following question:—"If you know anything of a conversation between Jenner Ankrim and his mother, as the agent of your father, respecting a transfer by Jenner of his property in the store, and the debts due to Jenner, to secure his father, state it." The question was objected to by the plaintiffs' counsel, and overruled by the court, who signed a bill of exceptions.

The defendant's counsel then put the following question to the same witness:—"If you know that your mother was agent for your father, in obtaining a transfer by Jenner to his father of the store goods, and Jenner's outstanding debts to secure his father for debts due to him, state what you know." To which the witness answered thus:—"I believe my mother was agent for my father; she was constituted agent by my father's conversations."

The defendant's counsel then put the following question to the witness:—"Do you know of Jenner treating with your mother as agent of your father in the transfer of the store, books, &c.?" This question being objected to by the plaintiffs' counsel, was overruled by the court, upon which another bill of exceptions was tendered and sealed.

The defendant's counsel then requested the witness to state, "what she knew of the transfer of the store by Jenner to his father;" to which the witness answered: "I was not present when Jenner put father in possession of the keys; my father did get possession of that store about the 6th of October, or within a few days of it."

The defendant also proved, among other things, by Margaretta Ankrim, that Jenner gave her the keys about the 6th of October, 1826: That when he delivered them to her he requested her to hand them to her father, and tell him to manage the store in his own way, or make the best use of what was there: That she gave the keys to her father on the same evening, and she believed she mentioned to her father the statement her brother had made. That her father, the next morning, took possession of the store, and she attended it for her father ever since it came

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into his possession : That it was at the time of the trial in her possession : That the value of the store goods at the time her father took possession was from twelve to fifteen hundred dollars, and that Jenner was not in possession of the store after the keys were delivered to her.

After having examined several other witnesses, and given in evidence certain documents, the contents of which it is unnecessary to state, the defendant again called Delia Ankrim, and requested her, "if she knew anything of a negotiation between her mother (at the request of her father) and Jenner, but a short time previous to the delivery of the keys of the store to her sister Margaretta, respecting such delivery or transfer, to state it." The question was objected to by the plaintiffs' counsel, and the objection was sustained by the court, who sealed a third bill of exceptions.

In conclusion, the defendant's counsel requested the court to charge the jury as follows :

*"1st. Jenner was by law permitted to prefer the debt due to his father, and such preference did not render the [*348] transfer fraudulent.

"2d. The debts due to the defendant from Jenner before issuing the attachment, must be set off against the claim of the trustees, so as to bar a recovery by the plaintiffs, except for the balance, if any, after the set-off.

"3d. An assignment to an individual for his own use in discharge of a debt to him, need not be recorded within thirty days, under the act of assembly.

"4th. If the defendant by the authority of Jenner, either as agent, care-taker, or manager for Jenner, or under a transfer to himself by Jenner, in discharge of, or in security for his debts, collected the outstanding debts of Jenner, then he has a right to set off the debts due to him from Jenner, before issuing the attachment."

The court gave the following answers in writing to these propositions, which, at the request of the defendant's counsel, were filed of record :

"1. The first is a correct abstract proposition of the law of Pennsylvania, and is so laid down to this jury.

"2. The pleas of set-off in this case are wholly inapplicable ; there was not, nor could there be any mutual dealings between the trustees, plaintiffs, and defendants, which is the foundation of the right to set-off. The tenth section of the act of 4th December, 1807, relative to domestic attachments, which has been so strongly relied upon to support the proposition, has no bearing upon this question, but only prescribes the duty of the trustees when they come to distribute the effects among the cred-

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itors; they will, under that section, give the defendant his dividend of the effects, upon the real debt due to him, after allowing the proper set-off, in respect to the dealings between him and Jenner Ankrim; therefore the debt due from Jenner before the issuing of the attachment cannot be set off against the claim of the trustees, but the money due on Jenner's books, collected by the defendant, must go into the hands of the trustees for distribution amongst all the creditors; unless the jury shall believe it belongs to him in his own right, by virtue of a valid agreement and assignment before the attachment.

"3. Affirmed by the court.

"4. Nothing short of a transfer or sale to Dr. Ankrim of the debts due Jenner Ankrim, in consideration and satisfaction of a debt due to him, can prevent the trustees' recovery; an authority given by Jenner to his father, as agent, care-taker, or manager for him, will not, as before stated, protect from the operation of a domestic attachment; and there is no pretence for set-off, as answered to the second of the two first propositions offered by the same counsel."

The jury found a verdict in favour of the plaintiffs below for six hundred and forty dollars and fifty-four cents, and the defendant prosecuted this writ of error.

[*349] *The following errors were assigned in this court:

1. The court erred in rejecting the evidence offered, as set out in the three several bills of exceptions.

2. The court erred in their answer to the second and fourth propositions, as reduced to writing and filed.

3. The plaintiff's replications do not traverse a material allegation of the pleas, to wit: that the said Adam J. Ankrim was indebted to the defendant before and at the time of the issuing of the domestic attachment.

After argument by *Dillingham* for the plaintiff in error, who cited *Stark. Ev. part i. 47, part iv. 81; Babb v. Clemson, 10 Serg. & Rawle, 419; Act of December 4, 1807, Purd. Dig. 72; 4 Stark. 1318*, and by

C. Gilpin and Tilghman, contra, who cited *3 Stark. 1301, Crug v. Tuttle, 3 Conn. Rep. 250; Day. Rep. 126; Wolf v. Carothers, 3 Serg. & Rawle, 240; Duncan v. Findlay, 6 Serg. & Rawle, 235*.

The opinion of the court was delivered by

KENNEDY, J.—Three errors have been assigned in this case. They, however, embrace but two questions. *First*, was the court below right in rejecting the evidence offered by the plain-

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tiff in error who was the defendant below? And, *second*, did the court charge the jury correctly on the claim of the plaintiff in error to be allowed to defalcate the debt owing to him by his son Adam Jenner Ankrim, from the claim of the defendants in error, who sued as trustees appointed under a proceeding by writ of domestic attachment against the son, according to our acts of assembly made in that behalf?

On the first question, it appears that the evidence rejected by the court was offered for the purpose of showing a treaty or negotiation between the wife of the plaintiff in error, as his agent, and their son Adam Jenner Ankrim, upon the eve of his removing to a distance, relative to his giving up a store of goods, of the value from twelve to fifteen hundred dollars, and his books of account connected therewith, to the father, the plaintiff in error, that he might manage and make the best of them, and secure to himself by means thereof a debt of about eighteen hundred dollars, which he claimed that the son then owed to him. It was testified by one of the daughters of the plaintiff in error, that the son on his going away delivered to her the keys of the store, with a request that they should be given to his father, and to tell him to manage it in his own way, or to make the best of what was there. That she did do so, and that on the next morning thereafter, the father took possession of the store and books. It was also further testified by the son himself, in his deposition, which had been taken under a rule of the court, and was read in evidence, that on his going away he delivered the keys of his store to his sister, for the purpose of delivering them to his father, that he might convert the effects in the store to the discharge of *the debt already mentioned; to [*350] the existence of which he also testified.

It appears to me, that the testimony rejected by the court below was not only pertinent to the issue, but competent and admissible under any view that can be taken of it. If the mother, on behalf of the father, either with or without authority from the father, proposed to the son to give up his store, and his books, containing an account of the outstanding debts owing to him for goods sold out of the same, in order to secure to the father the debt which he owed to him, and the son assented to it, it would certainly tend to confirm and explain more fully the object of the son's giving up the keys of the store afterwards. And the father's subsequent acceptance of the keys might well be considered by the jury as equivalent to an assent on his part to the terms and conditions upon which the keys were originally proposed to be delivered by the son, as well as a confirmation of all that had been said and done by the mother in bringing about the giving up of the store, etc.; of which the handing over

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of the keys would be a good symbolical delivery ; for, *omnis ratihabitio retro trahitur et mandato æquiparatur*. Or suppose that the son did not give his assent at the time of the proposal made by his mother, but had said to her, he would consider of it, and on the next day following, or so, had delivered the keys in the manner testified to by his sister, might and ought not both in fairness to be considered as parts of the same transaction, the latter as an execution of what had been proposed the day or two before? It seems to me, that the whole in such a case ought to be submitted to the jury. This, in substance, was the nature of the evidence offered by the plaintiff in error, and rejected by the court. It is said, it was not admissible because it related to what had taken place prior to, and at a time different from the delivery of the keys, and cannot therefore form any part of the agreement, even if there were one, under which the keys were delivered ; nor yet lead to any certain conclusion with respect to the nature and extent of it. This objection perhaps might in some measure be applicable, if the agreement alleged to have been made in this case had been committed to writing, and signed by the parties. Because, where the agreement of the parties on the subject is committed to writing, the rational as well as legal presumption is, that everything ultimately agreed on by them is inserted in it. So that in the course of their treaty certain things may be agreed on which afterwards, when they come at the close of their negotiation to put their final agreement in writing, are by consent modified, changed, or left out altogether, as forming no part of it. And wherever anything has been so previously agreed on, which does not appear afterwards to be in the writing, the presumption is that the parties by the last act of their minds on the subject, resolved that it should not be part of their agreement, and therefore left it out of the writing. Hence in part has arisen the general rule, that nothing which tends to alter, contradict, or vary what is [*351] contained in the writing can be given in *evidence, unless it be also proved that it was left out of the writing by fraud or mistake. It may also be observed, with respect to written agreements, that the signing and delivery thereof is the consummation of them, which reduces their execution to a single point of time, and everything that has been agreed on, within the compass of the writing, beyond which we are not to look. It is very different, however, in regard to oral agreements, which must be collected sometimes from various conversations and acts of the parties had and done at different times.

From a circumstance which has been mentioned, of the father and son's not being on speaking terms at this time, the son possibly conscious that he had not treated his father and his advice

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with due respect, there is perhaps some reason to believe that no formal and express agreement in detail was really entered into, under which the keys were delivered up; yet it cannot be doubted but that they were given up for some purpose, and upon an understanding and agreement of some kind. That being the case, this understanding and agreement must, as is frequently the case, be collected and obtained from previous conversations and subsequent acts on the subject. Those previous conversations and interviews must in every case of the kind be considered as having led to and caused the subsequent acts, when they cannot be accounted for but by referring them to those previous conversations; and the whole, when taken together, may develop pretty fully and clearly the design and intention of the parties, which is all that is desired in such cases.

Another objection is, that it being only evidence of what the son, Adam J. Ankrim, said to his mother, and he being a competent witness in this case for the father to prove it, it is therefore mere hearsay to every other, and cannot be proved by any other than the son. This objection is founded upon an entire misapprehension of the true character and nature of the evidence. It is not what is properly called hearsay; neither is it evidence of a secondary character, as has been again alleged against its admissibility. It was offered for the purpose of proving an oral agreement, to which the son was a party. Now it is only by giving evidence of the declarations and acts of the parties to such an agreement, that it can be established; and third persons who were present, heard what was said, and saw what was done, are introduced and brought into court every day to testify to all they heard and saw upon such occasions. Their competency, and the admissibility of such testimony has never been doubted, where the parties to such agreement are also the parties to the suit in which the witnesses are called to testify. As the great object of adducing testimony, is to arrive at the truth, in order that justice may be administered, it is difficult to imagine why the change of parties to the suit should render a change of witnesses necessary, to prove the truth of the same facts, as long as they are not of the parties to the suit, nor interested in the event of it. The agreement consists of what is said and done upon such occasions, and third persons *who were present, hearing and seeing all that was said [*352] and done, are just as capable of relating it intelligibly and truly as the parties or either of them would be; and sometimes much more worthy of being relied on for truth and accuracy. Whether an oral agreement was made or not; what were the terms and conditions of it, and who were the contracting parties, are matters of mere fact, which must be proved as other

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facts are ; that is, by witnesses who were present at the making of the agreement, and heard and saw all that was said and done in respect to it. Mr. Starkie, in his *Treatise on Evidence*, part iv. page 81, says, "an oral contract may be proved by any witness who was present at the time, or who heard the defendant admit the existence of such a contract." And according to the doctrine laid down in *Gibblehouse v. Stong*, 3 Rawle, 437, I can perceive no good objection that could have been made to the plaintiff in error having given in evidence the admissions of his son made at any time before the issuing of the writ of domestic attachment, showing that he had given his father the store and books of accounts, towards securing the debt which he owed to him ; or any other admissions of the son, going to show that he had put his father in possession of the goods to dispose of them ; and of his books to collect the money due on them. Any one not interested in the suit would have been a competent witness to have proved such admissions, who was present at the time and heard them made.

It has also been contended, that as the son's deposition was taken by the father, and he has testified to nothing having passed between him and his mother on the subject of the store and the book of account and the giving of them up to his father for any purpose whatever, that no other person can therefore be resorted to by the father as a witness for this purpose. There is nothing in this objection. The son is no more competent to prove this matter than any other who was present at the time ; and every other person present, with the exception of the mother, is just as competent to prove it as the son. If a party has two or more witnesses by whom he can prove various facts, that is, all these various facts by each witness, he may call up one of them, and after getting his testimony as to some of the facts only, may forbear to examine him further as to the remaining facts ; and if the witness does not in compliance with the obligation of his oath, declare as he ought his knowledge of them, the party calling him may dismiss him without it. But whoever heard before that by doing so he had put it out of his power to prove these remaining facts by any other witness ? It cannot alter the nature of the case, that the witness so called was so connected with the remaining facts, that if true, he must have known their existence, unless perchance they had escaped his recollection. It was perfectly immaterial in this case whether the plaintiff in error called his son to prove any of the matters which he offered to give in evidence. They are all such as might be proved by any other. He was therefore not bound to call his son for such purpose if he had been standing by him. Any

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*other person present at the time the thing took place, of which evidence was offered to be given, was as competent as the son, and therefore the father was at full liberty to exercise his own will in this particular. It is not like the case of subscribing witnesses to a written contract or will, who, if within the jurisdiction of the court where the existence of such contract or will is controverted, must be first called by the party wishing to establish the instrument; and until he has first called and examined them fully touching the execution of it, he cannot call any other witness: if, however, he fail to prove the execution by the subscribing witnesses, he may then call others. The reason for this is, that the subscribing witnesses are supposed to know more about the making and executing of the contract or will, which they have been called particularly to attest, and for that purpose to put their names to, than other persons whose attention and notice of the matter do not appear to have been so particularly required. Hence the party is not left at liberty in the first instance to call whom he pleases to testify, but is compelled by the rule of law established in this behalf, to adduce first the subscribing witness or witnesses, if to be had. No such rule, however, applies to the case under consideration. I am therefore of opinion, that the court below was wrong in rejecting the evidence offered by the plaintiff in error.

On the second question, I also think that the court erred in charging the jury. The president judge who delivered the charge of the court to the jury, seems to have been most decidedly of opinion, and so instructed them, that without an agreement made between the father, the plaintiff in error, and his son Adam Jenner Ankrim, by which the latter, in consideration and in satisfaction of the debt which he owed the former, assigned, transferred, or sold to him the debts owing to him, the son, for store goods sold and collected by the father, the debt which the son owed to the father could not be set off or defalcated out of the money so collected by the father. If the father, under an oral permission or authority from the son, and without any transfer or assignment of these debts, collected them before the writ of domestic attachment was issued, he had most unquestionably a right as against the son to have the amount of the debt which the son owed to him defalcated out of the moneys so collected. This he would clearly have been entitled to under the provisions of the defalcation act of 1705. The father, after having collected the debts under such permission or authority, would have stood indebted to the son in the amount of the money so collected, and the son being previously indebted to the father, they would then have been mutually indebted to each other in their own respective rights, thus

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bringing the case directly within the very letter as well as the spirit of the defalcation act. If the son after this, and before the issuing of the writ of domestic attachment against him, had brought a suit against his father for the recovery of the money so collected, the father would have had a right to set off his debt owing to him by his *son, against the son's claim, [*354] so far as was necessary to satisfy it. Such being the right of the father against the son, upon this statement of the case, before the suing out of the writ of domestic attachment, I am at a loss to conceive how the suing out of that writ could divest the father of his vested rights, or place him in a worse situation with respect to his debt against his son than he was before. The defendants in error, as trustees for the creditors of the son, by virtue of their appointment and the acts of assembly relative to domestic attachments, are only invested with those rights which existed in the son at and immediately before the suing out of the writ of domestic attachment against him; and have no power or authority beyond what he had at that time; unless where he before that assigned or conveyed away his estate, or anything belonging to him, for the purpose of defrauding his creditors, in which case the defendants in error, by the fifth section of the act of 1807, have full power given them to recover and dispose of whatsoever may have been so conveyed away, in the same manner as if the son had been seized or possessed thereof himself at the time of suing out the writ of attachment. With this exception, it is manifest from the whole tenor of the acts of assembly on this subject, that the trustees have no right to claim what the son himself could not have claimed at the time of suing out the writ of domestic attachment. I am also further of opinion, that if the son, before the suing out of the writ of attachment against him, had brought an action of debt, or on the case, and declared in *assumpsit* for money had and received, against his father, the father might have set off the debt owing to him by the son, against the claim of the son, without giving any evidence to show that he had had even an authority from his son to collect the money; because the son, by bringing such an action against the father, would have affirmed the authority of the father to collect and receive the money, and would thereby have acquitted those who had paid it to the father. And it seems to me likewise, that the trustees, by bringing this action against the father, have affirmed his authority to receive the money; and if it was received by him before the suing out of the writ of domestic attachment, he would have a right to set off any debt owing to him anterior to that time by the son. If the defendants in error had not intended to affirm the authority of the father to

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receive the money, they ought to have looked to those persons respectively from whom the father received it.

From what I have already said on this second question in this case, it necessarily follows, that if there was an agreement made between the father and son, by which the son assigned the goods and debts to the father, to satisfy or secure to the father the debt which he owed to him; or if the son gave up the goods and his books of account to the father for this purpose, and they were accepted by the father before the suing out of the writ of domestic attachment against the son, the father would be entitled to have his debt satisfied out of the money arising from the sale of the goods and the collection of the *debts; and it would be wholly immaterial upon either [*355] of these hypotheses, whether the debts were collected before or since the issuing of the writ of attachment.

The judgment is reversed and a *venire facias de novo* awarded, if the defendants in error should think that they have any chance of success in their suit, upon the principles here laid down.

Judgment reversed, and a *venire facias de novo* awarded.

Cited by Counsel, 3 Wh. 44, 491; 9 Barr, 357; 8 C. 125.

Approved, 6 Wh 582.

Cited by the Court, 2 Wh. 245; 3 H. 395.

[PHILADELPHIA, JANUARY 21, 1834.]

Logan and Another *against* Jennings.

IN ERROR.

Where the action sounds in damages, judgment for the plaintiff on demurrer is interlocutory, and it is necessary before final judgment, that damages should be assessed by a jury. Until final judgment a writ of error does not lie.

A WRIT of error having issued to the District Court for the city and county of *Philadelphia*, it appeared from the record returned to this court, that the action was trespass *vi et armis quare clausum fregerunt*, brought by the defendant in error against the plaintiffs in error. The defendants below filed a special plea, to which the plaintiff below replied specially, and the defendants demurred specially to the replication, assigning various causes of demurrer.

The District Court gave judgment on the demurrer in favour of the plaintiff below, and the defendants sued out a writ of error.

The cause was argued upon the questions arising upon the

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pleadings ; but this court having given no opinion on them, it is unnecessary to enlarge the report by stating them.

P. A. Browne moved to quash the writ of error, because the judgment of the court below was not final, and therefore not the subject of a writ of error.

Norris and Rawle, contra.

The opinion of the court was delivered by

ROGERS, J.—When the action sounds in damages, as in covenant, trover, trespass, &c., judgment for the plaintiff, on demurrer, is interlocutory, “that the plaintiff ought to recover his damages,” leaving the amount of them to be afterwards ascertained, *Lilly’s Entries*, 57. The case at bar is an action of trespass *vi et armis*, in which, on a demurrer, the court gave judgment for the plaintiff. It is therefore necessary before final judgment, that the damages should be assessed by a jury. But until final judgment, a writ of error does not lie. *Metcalf’s Case*, 11 Co. 40 ; *Russell v. Pratt*, 1 Leonard, 193 ; *Lilly’s Entries*, 57. We have been requested to give an opinion on the [*356] points *raised by the demurrer, but this we do not feel ourselves at liberty to do. A writ of error does not remove the record where final judgment has not been rendered. *Wilson v. Ingoldsby*, 2 Ld. Raym. 1179, and *Canning v. Wright*, 2 Ld. Raym. 1531. That the court is bound to quash the writ of error, also appears from the case of *Rejindoz v. Randolph*, 2 Strange, 834 ; *Vice v. Burton*, 2 Strange, 891. If the parties are put to any inconvenience by the delay, it cannot be avoided. The plaintiff might have had his damages assessed, notwithstanding the writ of error, or the writ would have been quashed at an earlier day.

Writ of error quashed.

Cited by Counsel, 1 Wr. 220 ; 11 Wr. 349 ; 5 N. 510, s. c. 6 W. N. C. 137.

Cited by the Court, 2 G. 242 ; 3 N. 240, s. c. 4 W. N. C. 426.

[PHILADELPHIA, JANUARY 21, 1834.]

Baker against Lewis.

IN ERROR.

The expression by the court, of an opinion upon the evidence, even if incorrect, is not the subject of a writ of error. But if the court give a binding direction on the facts, and thus withdraw them from the jury, it is error

[Baker v. Lewis.]

To tell the jury that where a testator is of sound mind, and not under undue influence, he has a right, which cannot be controlled, to make such disposition of his property as he pleases, and that under such circumstances, the reasonableness or otherwise, of his testamentary dispositions is of no consequence, is not error. But to instruct them that the contents of the instrument are not evidence, however unreasonable and absurd its testamentary dispositions may be, even where its execution is impeached on the ground of fraud and imbecility of mind in the testator, is error.

WRIT of error to the Court of Common Pleas of *Delaware* county. The defendant in error was the plaintiff below.

The nature of the case, and the points decided, sufficiently appear from the opinion of the court, which, after argument by *Dick*, *S. Edwards*, and *Kittera*, for the plaintiff in error, and *Lewis*, *J. Edwards*, and *Tilghman*, for the defendant in error, was delivered by

ROGERS, J.—This was a feigned issue, directed by the register's court to the Court of Common Pleas of Delaware county, to try the validity of a writing, purporting to be the last will and testament of Azariah Lewis, deceased. The plaintiff and principal devisee examined the three subscribing witnesses to the will, two of whom deposed, that he was of sound disposing mind, &c., at the time the instrument of writing was executed; the other, that he was sane at the time it was signed. The defendant opposed the probate of the will, on two grounds; first, imbecility of mind, caused by age and infirmity, and secondly, undue influence exercised over the testator by his son Robert, the principal devisee, either by himself, or at his instance. *To these points many witnesses were examined, who proved facts, going to the execution of the [*357] instrument, which, if believed by the jury, entitled the defendant to a verdict.

The remarks attributed to the court in the first exception, are but the expression of an opinion on the evidence, which, if even incorrect, is not the subject of error. It is not an error of which a superior court can take notice, if there should have been any mistake or want of accuracy in remarking on the facts. *Poorman v. Smith's Executors*, 2 Serg. & Rawle, 467. If the court had given a binding direction on the facts, it would have been otherwise, for where the facts are withdrawn from the jury, it is error. *Riddle v. Murphy et al.*, 7 Serg. & Rawle, 237. But this the court have not done, for the decision of the facts is referred to the jury in language which we cannot misapprehend. A mistake of the evidence by the court can only be remedied at the time, or on motion for a new trial.

The remaining objection (for I shall not notice the exceptions which were abandoned on the argument) is of a more serious

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character. After some preliminary statements, the correctness of which cannot be doubted, the court remark to the jury: "And you will recollect, that upon the facts given you in evidence, you are to make up your minds; and that the reasonableness or otherwise of the dispositions contained in the paper before you, forms no part of your consideration." If the court had said, as it is contended by the counsel they intended to say, that where a testator is of sound mind, and not under undue influence, he has a right, which cannot be controlled, to make such disposition of his property as he pleases, there would have been no error, for without doubt, under such circumstances, the reasonableness, or otherwise, of the dispositions would have been of no consequence. But this is not the fair import of this part of the charge, nor could it have been so understood by the jury. The direction amounts to this, that the contents of a will are not evidence, however unreasonable or absurd its provisions may be, even where the execution of the instrument is impeached on the ground of fraud, or imbecility of mind in the testator. This is a position as contrary to authority as it is to principle. Where a will is impeached for imbecility of mind in the testator, together with fraudulent practices by the devisees, the intrinsic evidence of the will itself, arising from the unreasonableness or injustice of its provisions, taking into view the state of the testator's property, family, and the claims of particular individuals, is competent and proper for the consideration of the jury. *Patterson v. Patterson*, 6 Serg. & Rawle, 55. It is not only proper, but in some cases, in connection with other circumstances, it may be evidence of a most decisive kind. Whether that was the case here, we are not called upon, nor would it be proper for this court to say.

Judgment reversed, and a *venire de novo* awarded.

Cited by Counsel, 1 Wh. 405; 2 Wh. 81; 3 Wh. 273; 4 Wh. 169; 1 W. & S. 77; 4 W. & S. 249; 10 Barr, 487; 1 J. 193, 218; 2 J. 143; 4 H. 272; 12 C. 413; 3 Wr. 181; 15 S. 360.

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*[PHILADELPHIA, FEBRUARY 10, 1834.]

The President and Managers of the Union Canal Company of Pennsylvania *against* O'Brien and Others.

CERTIORARI.

The act of assembly of 2d April, 1811, to incorporate the Union Canal Company of Pennsylvania, does not authorize the company to erect a dam across the whole channel of the river Schuylkill; but the supplementary act of 20th

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February, 1826, does authorize the erection of such a dam, and these acts being in *pari materia* must be construed as one act. Therefore the remedy provided by the 13th section of the act of 1811 for injuries to property therein mentioned, may be applied to obtain redress for such injuries as the erection of the dam may produce directly and immediately to property, or as may be in all cases of the like kind the inevitable consequence of its erection under the authority contained in the act of 1826.

The complainant, seeking a remedy under the acts above mentioned, must set out in his petition the nature of the alleged injury, and the particular ground of complaint, so that it may appear whether he claims damages for such an injury as the law provides a remedy for, or complains of *damnum sine injuria*; and if he fails to do so, this court will quash the proceedings of a jury giving him damages, and the judgment of the Court of Quarter Sessions entered thereon.

THIS case came before the court on a *certiorari* to the Court of Quarter Sessions of the county of *Philadelphia*.

It was argued by *J. C. Biddle*, for the canal company, and by *Kittera*, *contra*.

The opinion of the court was delivered by

KENNEDY, J.—The proceedings in this case were commenced and concluded in the Court of Quarter Sessions in the city of Philadelphia, and have been removed into this court by a writ of *certiorari*. Dennis O'Brien and others were the complainants, and presented their petition in that court, as is alleged under the provisions of an act of assembly passed the 2d of April, 1811, entitled "An act to incorporate the Union Canal Company of Pennsylvania," who were the respondents below, and plaintiffs in error here. The thirteenth section of this act, which has been referred to as authorizing the proceedings in this case, declares, "that if, in the opinion of the President and Managers of the said Union Canal Company of Pennsylvania, the construction and use of any different mode or device, or any improvement hitherto adopted, or such as may hereafter, anywhere be invented in the system of internal navigation, will be beneficial, it shall be lawful for them to make use of and apply the same, from time to time, and as well for such purposes, as for the necessary prosecution of the same, the said President and Managers, and their engineers, workmen, and labourers, to enter into and upon all and singular the land and lands intended or supposed to be the proper route for the said canal and lock navigation; and shall have the power to purchase so much land along the track of the canal and adjacent thereto, and tenements, mills, mill-ponds, waters, water-courses, *or other real [*359] hereditaments as shall in their opinion from time to time be necessary; and in default of purchasing, it shall be lawful for the Court of Quarter Sessions, or the Mayor's Court, in the city of Philadelphia, on the application of the owner of the said

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ground, or of the said president and managers, to appoint three suitable and judicious persons of any neighbouring county, at their discretion, or at the request of either party, to award a *venire* directed to the sheriff of any adjoining county to summon a jury of disinterested men, in order to ascertain and report to the said court what damages, if any, have been sustained by the owner of the said grounds by reason of the said canal or other works; which report, being confirmed by the court, judgment shall be entered thereon, and execution on motion may be issued in case of non-payment of the money awarded, with reasonable costs, to be assessed by the court; and it shall be the duty of the jury in valuing any lands, tenements, or hereditaments to take into consideration the advantage derived to the owner or owners of the premises from the said navigation passing through the same."

The petitioners state that, on the first day of April, 1825, and ever afterwards, they were "seized in their demesne as of fee, of and in a certain messuage, tenement, distillery, and lot of ground thereunto appertaining, situated in the borough of Reading, county of Berks, bounded on the south by west Penn's street, on the east by the road leading from Penn's street up the bank of the river Schuylkill, and on the west and north by the said river Schuylkill, and land of George M. Probst." And "that on or about the tenth day of November, A. D. 1826, the President and Managers of the Union Canal Company of Pennsylvania, by their superintendents, engineers, artists, and workmen, made and erected a dam across the said river Schuylkill, a short distance below the said property: That in consequence of the construction of said dam, the said messuage, distillery, and lot of ground first mentioned, have been considerably injured, and your petitioners have sustained great damage thereby."

The petitioners also further complained, of being injured in another lot of ground, of which they were owners, by reason of the Union Canal Company's having made the canal through it, but for this, it appears by the report of the jury, that they were satisfied by the Union Canal Company's buying it of them and paying them their price for it. No damages were therefore assessed on account of it, but four thousand five hundred dollars were assessed on account of damage done to the other property, and reported by the jury in favour of the complainants, to the Court of Quarter Sessions of the county of Philadelphia. The court, after confirming this report, entered judgment upon it.

Four exceptions having been taken to the proceedings and report of the jury, which may all be resolved into a question of jurisdiction in the Court of Quarter Sessions to take cognizance

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of the petition of the complainants, and to proceed upon it as they did.

It has been contended, that inasmuch as the act mentioned above, *incorporating the Union Canal Company, did [*360] not authorize the company to erect a dam across the whole of the channel of the river Schuylkill, the remedy provided in the thirteenth section, which has been recited, cannot be considered as applicable to an injury occasioned thereby; for it is only those injuries which arise from the performance of acts by the company that are authorized by the act of assembly, that it provides redress or a remedy for. From this act of the second of April, 1811, I think it is pretty evident that the company had no authority to erect and extend a dam across the whole of the river Schuylkill: on the contrary, they are expressly confined by the ninth section of the act, to the erection of wing-dams, and prohibited from extending them more than one-third across the river: and if there were no other act of assembly on the subject, this argument would be perfectly correct. But the act of the twentieth of February, 1826, entitled "An act supplementary to the act entitled 'A further supplement to the several acts to incorporate the Union Canal Company of Pennsylvania,'" was passed avowedly for the purpose of enabling the company to erect the dam mentioned in the petition of the complainants, for the purpose of connecting their works in the most advantageous manner possible with the works of the Schuylkill Navigation Company. And these acts being *in pari materia*, must be construed as one act, and the remedy therefore provided by the first, may, as it appears to me, be well applied to obtain redress for such injuries as the erection of the dam shall produce immediately to the lands of the complainants, or shall in all cases of the like kind be the inevitable consequence of its erection, under the authority contained in the act of 1826. It has likewise been argued, that if the legislature had intended to have extended the course of proceeding prescribed by the thirteenth section of the act of 1811, for obtaining redress of injuries occasioned by the erection of a dam or dams, they would have been more explicit, and have designated them specifically, as they have done in the tenth section of the act of the eighth of March, 1815, incorporating "The President, Managers, and Company of the Schuylkill Navigation Company." Now, although there may be something plausible in this, yet there is certainly nothing conclusive in it; for it was not necessary that the legislature should have recourse to a specific description of all the injuries intended to be provided for, in order to accomplish this object. General terms are frequently used for this purpose, and perhaps it is the more safe mode, lest by omission to enumerate

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all particularly that were designed to be embraced, some might be left unprovided for. By the terms of the thirteenth section of the act of 1811, the Union Canal Company "shall have the power to purchase so much land along the tract of the canal and adjacent thereto, and tenements, mills, mill-ponds, waters, water-courses, or other real hereditaments, as shall in their opinion from time to time be necessary; and in default of purchasing, it shall be lawful for the courts of Quarter Sessions, or the Mayor's Court in the city of Philadelphia, on the application of [361] the *owner of the said ground, &c., to award a *venire* directed to the sheriff, &c., to summon a jury of disinterested men, in order to ascertain and report to the court what damages, if any, have been sustained by the owner of the said grounds by reason of the said canal or other works." The company are here not only authorized to purchase as much land along the tract of the canal, and adjacent thereto, as shall be necessary for it, but are likewise authorized to purchase any tenements, mills, mill-ponds, waters, water-courses, or other real hereditaments, without restriction as to situation, as shall be necessary not merely for the construction of the canal alone, but for the "other works" connected with it. The "tenements" or "other real hereditaments" here mentioned, are not spoken of as lying on the tract of the canal, and although not on it nor adjacent to it, yet from their relative situation to some of the works connected with the canal, it may be necessary for the company to use them; for instance, to raise an abutment upon them to a dam erected, as in the present case, across the Schuylkill river, or to use them, as perhaps was done in this case, by overflowing them with water by the erection of the dam. For lands thus used by the company, and thereby injured to the owners of them, upon the company's failing to purchase them, the owners thereof would be entitled to the remedy prescribed by the thirteenth section of the act. Hence it may be that the complainants in this case have sustained a damage as an inevitable consequence from the erection of the dam by the company, in having their messuage, distillery, and lot of ground constantly inundated with the water of the river, although situate at some distance from the canal, and above the dam upon the river. But it is impossible to say from anything that is stated in their petition, or that is reported on the subject by the jury, that they have sustained any damage from such a cause. The nature of the injury, and the particular ground of their complaint, are not set forth in this petition. This ought to have been done, at least, if for no other reason, that the Court of Quarter Sessions might see and determine, first, whether it was such a case as fell within the provisions of

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the act of assembly or not; for unless it should appear to be embraced by the act, the Quarter Sessions had no jurisdiction over it. Or it might be a case of *damnum sine injuria*, as was adjudged in the case of *Shrunk v. The President, Managers, and Company of the Schuylkill Navigation Company*, 14 Serg. & Rawle, 71. In that case it was held, that the injury must be such as is done to the property immediately, and that the party was not entitled to compensation under the act of assembly of the 8th of March, 1815, for an injury sustained in consequence of the erection of a dam across the river Schuylkill, by the Schuylkill Navigation Company, by reason of which the shad, herring, and other fish were prevented from passing up the same, and the plaintiff, who was the owner of land fronting on the river, and had the exclusive right of drawing seines thereon, lost the benefit of using his land for that purpose in fishing, as he had a right to do before the erection of the dam.

*The late chief justice who delivered the opinion of the [*362] court, in page 83, says, "There would be no end to [*362] damages for injuries considered in the most extensive sense of the word. For not only may the owners of land contiguous to the river, complain of injury by the obstruction to the ascent of the fish, but also all other persons living in towns or lands near the river. All these persons feel the loss of fish. They either cannot get them at all, or must pay a higher price for them. All persons accustomed to fish with an angle or hoop-net may truly say they are injured. There are other kinds of injury, too, sustained particularly by the owners of the lands on the river, between Fair Mount dam and the Lower Falls. All these persons have lost the benefit of a navigation, free from toll, in batteaux, flats, &c., which was very useful, as it served for carrying produce to market and bringing up manure for their lands. Yet it has not been contended that for such injuries compensation is to be made. Suppose the health of the country to be injured by the evaporation from the dams—is compensation to be made for this, the greatest of all injuries? I presume not. Where then, are we to stop, or what is to be the boundary, if we go beyond the line I have mentioned? I confess I should be at a loss to fix another."

Now, although the terms of the act of assembly upon which the question arose and was decided in *Shrunk v. The Schuylkill Navigation Company* are not *verbatim* the same with those employed in the act upon which the proceedings in the case before us are said to be founded, still, there is nothing contained in this latter act, that will warrant an extension of the rule laid down in *Shrunk's Case*, as to the nature of the injury for which compensation shall be allowed. And as it does not appear either

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in the petition of the complainants, or from the report of the jury, what the nature of the injury was, which the erection of the dam by the Union Canal Company is said to have produced to the messuage, distillery, and lot of land belonging to the complainants, and bounding on the river a short distance above the dam, it may be that it is not an immediate and direct injury done to the property by the erection of the dam, nor such as must inevitably follow in all cases from the performance of such an act. It is, for aught we know from the record, as likely to be an injury of the same description as some of those which have been mentioned as not coming within the provisions of the act of assembly. It may be such as to render the messuage of the complainants no longer safely habitable on account of the impure and noxious evaporation produced by the dam; and if so, although a very great damage, the complainants would clearly not be entitled to have compensation for it: it would be *damnum absque injuria*. But as the ground and nature of the injury do not appear in any part of the proceeding, we are left completely in the dark about it, and to conjecture what it was. This, however, cannot be tolerated. The cause of action or nature of the complaint ought to be set forth in all cases, so that it may be seen and judged of in the first place, whether, [*363] supposing it to be true, it is such in *law as will entitle the party to recover; and if it be, in the next place, it ought to be set forth, to the end that it may appear upon record thereafter, what it was that the plaintiff obtained compensation for, and be a bar to his ever claiming it a second time for the same cause. But in a case like the present, when the Court of Quarter Sessions have merely a special and delegated authority to proceed in it, an additional, and perhaps not less cogent reason presents itself for requiring the precise ground and nature of the complaint to be fully set out by the complainant in his petition, in order to show then and thereafter, that the Quarter Sessions had a right to take cognizance of it. Nothing, however, of the kind appearing in this case, we therefore think that the proceeding and judgment should be quashed.

Proceeding and judgment quashed.

Cited by Counsel, 9 W. 232; 7 H. 16, 137; 3 C. 103; 14 Wr. 271; 14 S. 392. Followed, 32 S. 360, s. c. 2 W. N. C. 626.

[PHILADELPHIA, FEBRUARY 17, 1834.]

Hough, Acting Executor of Hough, *against* Hough
and Another.

IN ERROR.

A testator, having children living at the time of making his will, and having provided for the issue of those who were deceased, directs the residue of his estate to be divided, on the decease or marriage of a particular daughter, among his 'present surviving children, and the representatives of those of them that shall be then deceased'—Held, that the issue of those deceased at the time of making the will, do not participate with the issue of those dead only at the happening of the contingency.

ERROR to the Court of Common Pleas of *Bucks* county. The defendants in error were plaintiffs, and the plaintiff in error defendant below.

The cause was tried at a special court held by his honour Judge King.

In giving the opinion of the court, the Chief Justice has fully stated the only question decided.

J. M. Porter, for the plaintiff in error.

W. B. Read, for the defendants in error.

PER CURIAM.—A testator having children living at the making of his will, and having provided for the issue of those that were deceased, directs the residue of his estate to be divided, on the decease or marriage of a particular daughter, among his "present surviving children and the representatives of those of them that shall be then deceased;" and the question is, shall the issue of those deceased at the making of *the will participate with the issue of those dead only at the hap- [*364] pening of the contingency? To state this question is to decide it. To maintain the affirmative, it is necessary to reject the word "present" as irreconcilable to it, and also to dispense with the word "then" as redundant. Retaining these words it is impossible to frame a more precise and explicit exclusion of the issue of children dead at the making of the will than is found in the short and simple expressions of the testator himself. The construction put on these below is therefore not to be sustained.

Judgment reversed, and judgment rendered
for defendants below.

Cited by the Court, 8 Barr, 231.

Cited by Counsel, 3 S. 76.

Cited by Auditor, 7 N. 484.

[PHILADELPHIA, FEBRUARY 17, 1834.]

Baer *against* Kistler

IN ERROR.

A prothonotary, in entering judgment on a bond accompanied by a warrant of attorney, according to the provisions of the act of assembly of 24th February, 1806, is not the agent of either party, or of the law, and the payment of the money by the debtor to him, is a mispayment, and does not discharge the debt.

It appeared from the record of this case, returned on a writ of error to the Court of Common Pleas of *Lehigh* county, that C. L. Hutton was, on the 23d of December, 1826, commissioned prothonotary of *Lehigh* county, and on the 26th of the same month entered into a bond to the commonwealth, with security, in the sum of \$4500, conditioned that he should "in all things well and faithfully execute the duties of his office, and pay over moneys to the state treasurer," &c. On the 2d of February, 1830, judgment was entered by him on a bond given by the defendant below, the plaintiff in error, to the plaintiff below, the defendant in error, dated 1st of February, 1830, in the penalty of four hundred and ten dollars and thirty cents, conditioned for the payment of two hundred and five dollars and fifteen cents, on the 2d of March, 1830. The judgment was entered of February Term, 1830, by virtue of a warrant of attorney accompanying the bond, under the provisions of the act of the 24th of February, 1806. On the day on which the judgment was entered, Hutton gave to the plaintiff below a receipt for the bond, which was left in the office of the prothonotary. On the 26th of March, 1830, the defendant below paid to the prothonotary or to his clerk, two hundred and two dollars, the balance due on the judgment, and also sixty-two cents, the fees for entering it, took the receipt of the prothonotary's clerk for the amount paid, received the bond, and cancelled it. In February, 1831, the obligee went to the prothonotary's office to receive his [*365] money, but Hutton had been previously removed from office, and had died insolvent. The plaintiff below issued a *feri facias* on his judgment on the 10th of May, 1832, and on the return day of the writ an application was made to set it aside, on the ground that, by the payment, delivering up, and cancelling of the bond, in the manner above stated, the defendant below was discharged. The court, on this application, ordered an issue to try the question of payment and discharge, and a case was stated, in the nature of a special verdict, embodying the facts above stated.

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In pronouncing the judgment of the Court of Common Pleas, the President Judge stated the question submitted to him to be, whether the prothonotary had a right to receive the money upon the judgment which he had entered, and whether the payment made by the defendant was legally made, so as to protect him from all claims on the part of the plaintiff for the amount of the judgment.

His opinion was, that it was not the duty of the prothonotary to receive the money : That the condition of his official bond did not embrace the transaction : That he had no legal right nor any authority from the plaintiff to receive the money : That if the prothonotary was the agent of any one, he was the agent of the defendant, and for his default the defendant must suffer : That the defendant was not protected by the payment of the money to the prothonotary, as it was never paid to the plaintiff, and that judgment must be entered in his favour, for the amount of the judgment and interest.

Judgment having been entered in conformity with the opinion of the court below, the defendant removed the record by writ of error to this court, where the cause was argued by *Brooke* for the plaintiff in error, who cited *Commonwealth v. Clarkson*, 1 Rawle, 291 ; *Carmack v. Commonwealth*, 5 Binn. 184.

Gibbon and *J. Sergeant* were stopped by the court.

PER CURIAM.—This is one of those cases about which nothing is to be said, but to pronounce the law. Without then determining what may be the liability of the prothonotary's sureties—a point not before us—it is sufficient for the occasion to say, that the officer was not the agent either of the party or the law, and that the receipt by him involved the debtor in a mispayment, which consequently cannot be set up as a discharge of the debt.

Judgment affirmed.

Cited by Counsel, 3 Barr, 352 ; 3 C. 397 ; 1 Wr. 75.

*[PHILADELPHIA, FEBRUARY 17, 1834.]

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The Commonwealth *against* Beaumont.

IN ERROR.

The judgment of the Court of Common Pleas in quashing an inquisition in a case of lunacy, is revisable by this court. But in such a case a writ of error

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does not lie. The process by which the proceedings are to be removed is a *certiorari*.

It seems, however, that the judgment of the Court of Common Pleas, after pleading to issue on a traverse of the inquisition, is revisable on a writ of error.

WRIT of error to the Court of Common Pleas of *Bucks* county.

In this case, a commission in the nature of a writ *de lunatico inquirendo* having issued against John Beaumont, an inquisition was returned on the twenty-second of May, 1833, finding that the defendant, "John Beaumont, aged seventy-five years, by reason of old age and long-continued sickness has become so far deprived of reason and understanding as to be wholly unfit to manage his estate, and hath been so for the last eighteen months and upwards."

Exceptions were filed on behalf of the defendant to the proceedings of the inquisition, both in point of law and fact, and the court, after hearing, quashed the inquisition; upon which the present writ of error was sued out.

Randall moved to quash the writ of error.

1. Because this court had no jurisdiction of the case, for which he cited *Gest's Case*, 9 Serg. & Rawle, 317; *Righter v. Rittenhouse*, 3 Rawle, 281.

2. Because the exceptions filed in the court below depended upon facts which this court is not competent to decide.

Ross and Kittera, contra, cited 1 Sm. Laws, 139; 3 Bl. Com. 427; 2 Madd. Ch. 732; *Moore v. Cooke*, 4 Serg. & Rawle, 231; *Cooke v. Reinhart*, 1 Rawle, 317.

The opinion of the court was delivered by

GIBSON, C. J.—By the eleventh section of the act of 1722, the judges of the Supreme Court are empowered to issue writs of *habeas corpus*, *certiorari*, and of error. By the thirteenth, they are "to examine and correct all, and all manner of errors of the justices and magistrates of this province, in their judgments, process, and proceedings in the said courts, as well as in all pleas of the crown, as in all pleas, real, personal, and mixed; and thereupon to reverse or affirm the said judgments, as the law doth or shall direct." Finally, it is declared generally, that "they shall minister justice to all persons, and exercise the jurisdiction and powers hereby granted, concerning all, and all and singular, the premises according to law, as fully and amply to all intents and purposes whatsoever, as the King's Bench, [*367] *Common Pleas, and Exchequer at Westminster, or any of them can do." The grant of these powers is

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confirmed by the sixth section of the fifth article of the Constitution, which provides that the Supreme Court and the several Courts of Common Pleas, shall have certain specified powers "besides the powers heretofore usually exercised by them." What then are the powers of the King's Bench, to say nothing of the other courts at Westminster, so broadly granted to the Supreme Court? "The jurisdiction of this court," says Sir William Blackstone, "is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires in every case where there is no other specific remedy. It protects the liberty of the subject by speedy and summary interposition." 3 Com. 42. As then the Supreme Court has a general jurisdiction of the proceedings of all inferior tribunals, as regards their regularity and legality, what argument is there to make this particular one an exception to it? It is said, the very section of the Constitution which confirms the previous grant of general powers to the Supreme Court, disposes specially of the subject of power over the persons and estates of those that are *non compotes mentis*, by committing it concurrently to the Supreme Court and the Common Pleas: whence an inference, *quoad hoc*, of an equality of jurisdiction in all respects. If this equality were conceded, the decisions of the several Courts of Common Pleas would be precedents for the Supreme Court and for each other; or the decisions of each would furnish precedents but for itself—a consequence productive, in either aspect, of the wildest uncertainty. It is plain, however, that the clause in question has regard to original, and not appellate, jurisdiction; for it is incredible, that the framers of the instrument should have intended to deprive the citizen, in a matter which peculiarly involves his liberty, of the high judicial protection which is so amply secured to him in the most trifling matter of property. Were the mere concurrence of jurisdiction to determine the question of parity, this court would be incompetent to revise the decisions of the District Court of the city and county of Philadelphia. Next, it has been said, that as the jurisdiction was originally a chancery one, and as a writ of error does not seem to lie to the law side of that court at this day, there is consequently neither writ of error nor appeal here; and this much is supposed to have been decided in Gest's Case. The inference from that case holds only as regards the instrument of removal; for it may well be that a writ of error is not the proper process, and yet the judgment of the court below not be irreversible. The superintending power

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given by the statute and the Constitution, has respect to the court, and not to the nature of the proceeding, further than concerns the form of the appellate process ; and even that is to be determined by the form it has received from the structure of our judiciary, and not the form it had originally. *Thus, principles of equity infused into what are elsewhere common law actions, become the subjects of exception and error, for the plainest of all reasons, that equity is a part of our law ; and even the remedy to recover a legacy which was originally a subject of chancery jurisdiction, having taken the shape of an action at law here, is attended with all the incidents of one. The same thing may be affirmed of many other substitutes for a bill in equity. As I am unable to recall the precise ground of the decision in Gest's Case, I the more regret that the Chief Justice happened to depart from his usual practice in plain cases, of embodying the substance of the opinion in a *per curiam* note of it ; but I venture to assert, that neither he, nor Mr. Justice Duncan, was so unmindful of what was due to the forum, as to surrender one of its undoubted prerogatives. The report contains no evidence of such a surrender. The motion to quash was indeed advocated on the ground of the English practice, according to which, the writ of error, being the only process of removal from the law side of the Chancery into the King's Bench, and having been superseded in that particular by an appeal to the king in counsel, ought, it was said, to be considered as exploded here ; and as no appeal is expressly given to the Supreme Court, it was contended that nothing can be substituted for it by implication. But can it be collected from the report, that the writ was quashed because the judgment was not the subject of revision ? Were an appeal given to the Supreme Court as a substitute for the appeal from the chancellor to the king, it might have been supposed that recourse to it alone could be had, as in the case of a libel for divorce ; but no such substitute being provided, it was natural to refer the subject to the general corrective powers of the court in the last resort, the form of the process being determinable, as in other cases, by the nature of the proceeding. A writ of error is the proper process of removal, where the primary tribunal is a court of record, and the proceedings to be removed either were according to the course of the common law in the first instance, or have assumed a common law shape subsequently ; but where they are summary, or the magistrate is not the judge of a court of record, it is a *certiorari*. Thus the latter is a proper process to remove the proceedings of justices of peace, and even the judgment of the Quarter Sessions where it has been rendered in a summary way pointed out by statute, as in the case of an appeal from a

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conviction by justices of the peace for refusing to assume the office of supervisor of the highways. *Ruhlman v. The Commonwealth*, 5 Binn. 24. Where, however, the proceedings have taken a common law form in a court of record, whether they originated there or not, the judgment can be removed but by writ of error: as where an action brought before a justice of the peace has been determined on an appeal to the Common Pleas; or even where the regularity of his proceedings has been determined on a *certiorari*, which is not a prosecution of the proceedings before the justice, but an original and independent process of review according to the course of the common law. *Clark v. Yeat*, 4 Binn. 185; *Cook v. Reinhart*, [*369] 1 Rawle, 317. On the same principle was adjudicated *The ship Portland v. Lewis*, 2 Serg. & Rawle, 197, which was the case of an issue to try a fact controverted in a libel, for work and materials furnished to a vessel, under the act of 1784; and *The Schuykill Navigation Company v. Thoburn*, 7 Serg. & Rawle, 411, which was an appeal from the decision of an inquest awarded by the same court on a petition for the assessment of damages, and which had taken the form of an action. The difficulty in respect to the judgment in *Gest's Case*, however, is in the fact that the proceedings in lunacy were originally on the law side of the Court of Chancery, and therefore, it might be supposed, according to the course of the common law, which would interpose no obstacle to a writ of error here. But it does not follow that all the proceedings of a court of record are according to the course of the common law, as is instanced in the appeal from the conviction of the supervisor of the highways, which was summarily determinable in the Quarter Sessions. Instances of the same sort may be found in statutory grants of original jurisdiction; as in *Lewis v. Walliek*, 3 Serg. & Rawle, 410, which was the case of proceedings in a domestic attachment; and *Miller v. Miller*, 3 Binn. 30, which was a libel for divorce; in both of which it was determined that a writ of error does not lie. It may be said, the jurisdiction in those cases was conferred by statute, and that it does not appear that the chancellor acquired his jurisdiction of lunacy otherwise than as the common law jurisdiction of the courts at Westminster was acquired at the dissolution of the Aula regis. But the jurisdiction, however acquired, is an extraordinary one; and it is not wonderful that the appellate jurisdiction of the King's Bench should have been contested, and eventually relinquished. The proceedings are certainly not in accordance with the ordinary forms of the common law known here; and having been conferred on the Common Pleas by the positive enactment of the Constitution, are revisable only by writ of *certiorari*. According to the prin-

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ciple indicated, they would seem to be revisable by writ of error, after pleading to issue on a traverse of the inquisition; but having been quashed before they assumed an ordinary common law form, and not because they are exempt from examination here, we are of opinion that the motion be sustained.

Writ of error quashed.

Cited by Counsel, 5 R. 122; 3 Wh. 557; 4 Barr, 302; 1 H. 74; 2 H. 487; 7 C. 468; 7 Wr. 113; 24 S. 247.

Approved in 4 W. 306, and 3 Wr. 412.

Cited by the Court, 2 Barr, 119; 12 Wr. 336; 7 S. 445, 454; 26 S. 468.

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*[*PHILADELPHIA, FEBRUARY 17, 1834.*]

Fritz *against* Hocker.

APPEAL.

The mediation and concealment by a grantee, at the time of the execution of the deed, of an impracticable plan of acquiring the property which is the subject of the grant, and afterwards refusing to perform the agreement which was the consideration of it, and subsequently acting in pursuance of such plan, are not such a fraud as will produce a rescission of the contract, and prevent the grantee from recovering in ejectment against the grantor.

THIS was an ejectment originally brought in the Court of Common Pleas of *Montgomery* county, by Peter Fritz against Christopher M. Hocker, for a tract of land and marble quarry, with the buildings thereon, situate in Whitmarsh township, in the county of *Montgomery*, containing twenty acres forty perches, an equal undivided moiety of which the plaintiff claimed under a deed executed to him by the defendant, in May, 1829.

The cause was removed by the defendant by *habeas corpus cum causa*, to the Circuit Court, where it was tried before Rogers, J., in July, 1833.

On the trial, the defendant proposed to give evidence that the consideration of the conveyance under which the plaintiff sought to recover had totally failed, and that there was fraud on his part in procuring it. To reach this result, he offered in writing, to prove the following train of circumstances:

"The parties are half brothers; the defendant is the elder; he was a marble mason in the city of *Philadelphia*, and the plaintiff served his time with him. The plaintiff became of age in the month of February, 1823, and was entitled to a small sum of money. The defendant had a large stock, and was engaged in extensive business. The defendant took the plaintiff into co-partnership on equal terms, allowing him a credit for the prin-

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principal part of the share of the stock, which was brought by the defendant into the concern. This partnership continued until March, 1826, when it was dissolved by mutual consent. The stock was valued, and the defendant permitted the plaintiff to take the whole of it at a valuation. The defendant in the meantime, had become the proprietor of the marble quarry and farm. The contract for it was made in the month of February, 1826, and it was consummated by the actual conveyances, dated, April 1, 1826. The consideration for the whole was fifteen thousand four hundred dollars. Of this, seven thousand and four hundred dollars were paid in cash, and a bond and mortgage executed for the balance of eight thousand dollars, which were afterwards discharged, the money for the purpose being raised by giving a bond and mortgage to a third person, viz.: Henry Beckett, on the 1st of May, 1827. The mortgage *was executed [*371] by Christopher M. Hocker alone, but the accompanying bond was the joint obligation of C. M. Hocker and Peter Fritz, the latter being in no respect concerned in the purchase of the quarry.

“Between the 17th of May, 1826, and the 18th of December of the same year, the plaintiff purchased of the defendant on a credit, marble from the quarry to the amount of three hundred and twenty-seven dollars, and between April 2d, 1827, and the 13th of December, 1827, he purchased in like manner, to the amount of one thousand and forty-three dollars and thirty-five cents. Between the 19th of March, 1828, and the 24th of December, 1828, he purchased in like manner, to the amount of two thousand four hundred and fifteen dollars and fifty-five cents; and also, between the 19th of May, 1828, and October 30th in the same year, he purchased in like manner, to be appropriated to the building of Arch Street Theatre, to the amount of eight hundred and thirty-seven dollars and twenty-five cents, making an aggregate at the end of the year 1828, of four thousand six hundred and forty-three dollars and sixty-five cents.

“In the beginning of January, 1829, Hocker pressed, through his counsel, the payment of this debt, and on the sixth of the same month, the plaintiff, through his counsel, communicated to Hocker a threat that he would take immediate steps to absolve himself from the responsibility incurred on account of Henry Beckett.

“On the 15th of January, 1829, the defendant entered a lien against the Arch Street Theatre,—Peter Fritz being made defendant, and sued out a *scire facias* thereon.

“Immediately afterwards, the plaintiff began to urge the defendant to enter into a co-partnership, having for its objects the marble quarry of the defendant, and the marble yard and

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the business of the plaintiff in the city. He frequently urged the large business that could be carried on ; the great advantage which would arise from it ; his extent of work actually engaged ; the great contracts which he was about to make, among the rest, representing that he was to have one-half the building of the Mint of the United States, and the large quantities of marble that would be wanted for it. For a considerable time the defendant remained unmoved by these importunities, and refused to enter into the co-partnership. He at length, however, consented, and agreed to become the partner of the plaintiff under certain terms, which were to be reduced to writing. P. Fritz estimated his stock at twelve thousand dollars, and stated that he had ten thousand dollars worth of work engaged. In expectation of enjoying a share of these advantages, and of the contracts to be made, the defendant agreed to put the one-half of the quarry at a price greatly below its value, to wit, seven thousand five hundred dollars. But it was distinctly understood by him, that the co-partnership was to be permanent in its duration, extensive in its operations, and to be the means of affording to the defendant a vent for his marble without imposing on him the necessity of seeking for it, and a place of deposit [*372] *in Philadelphia, under the care of a party interested, in whose fidelity reliance might be placed. The arrangement was carried into effect in the month of May, and the deed was signed and articles of co-partnership were executed, the whole forming one transaction, and being necessarily connected with each other. The defendant carried the arrangement into effect in perfect good faith. He used the joint names of himself and P. Fritz in the sales of marble. He styled the quarry and the teams the property of Hocker & Fritz, and he firmly intended to consider and treat his co-partner as such in all the transactions which might take place. No part of the purchase-money having been paid at the time, the deed, &c., were signed, and the defendant repeatedly sent to the plaintiff for money. He received for answer, inquiries concerning the record of the deed, and intimations that no money would be paid until the deed was recorded, which was in the defendant's hands. The defendant then recorded the deed, and sent again for the money, when for the first time, the plaintiff declared that he owed him none. He was now brought to believe that improper designs were harboured by the plaintiff relative to the co-partnership, and he immediately received the deed from the office of the recorder, and continued, as he still does, to retain it. Not long afterwards, he came to Philadelphia, and inquired why the name of the firm, as agreed on, had not been put up at the marble-yard. He was informed by the plaintiff that he

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never would put it up, and it never was his intention to put it up. The defendant received no part of the proceeds of sales at the yard, and no share of the advantages of any contracts which were made by the plaintiff. In the month of August, 1829, the plaintiff entered into a contract to supply the material and do the marble work of the northern half of the United States Mint; but it was not made known by the plaintiff to the defendant. On the contrary, the plaintiff, with a view to deprive him of the advantage of the contract, and to reserve it altogether for himself, on the 18th of February, 1830, dissolved the co-partnership without the consent of the defendant, and himself published the dissolution, and then immediately proceeded to complete the work for the Mint, which resulted in an operation to the extent of about from thirty to forty thousand dollars. During the period when the defendant believed the partnership to exist, the plaintiff received marble from the quarry to the amount of one thousand four hundred and seventy dollars and forty-five cents.

“Immediately after the said dissolution, Peter Fritz having himself in vain endeavoured to procure and purchase marble at the quarry, instigated his brother Frederick to make purchases, which he accordingly did, beginning with the 9th of April, 1830, and continued until he reached an amount of upwards of eight thousand dollars, of which a small portion only was paid for, leaving upwards of seven thousand dollars still unpaid for. A part of this marble was handed over from time to time to Peter Fritz, and on the 19th of January, 1832, he assigned the whole of what he had on hand, *together with his real estate, [*373] to Peter Fritz, who was then his debtor. An appraisal was made according to law, of the stock thus assigned, and it was valued at two thousand nine hundred and forty-eight dollars and twenty-eight cents. It was exposed to sale by the assignee, and so improperly and unfairly conducted that persons desirous of purchasing had no opportunity to do so; and Peter Fritz purchased in the whole, (excepting thirty-four dollars and fifty cents’ worth,) for one thousand seven hundred and sixty-four dollars and sixty-four cents, it being put up and sold in lots. No account has ever been settled by Peter Fritz as assignee. Frederick Fritz applied for the benefit of, and was discharged under, the insolvent law, in the spring of 1832. At the time of his hearing, the plaintiff, as a witness, swore that Frederick had not the capacity for carrying on business; and very soon after his discharge, he reinstated him in the same yard, with the same marble for sale, and the word “agent,” was added to the name of Frederick Fritz, on the sign which had previously been there. The whole course of proceedings on the part of the plaintiff was conducted and carried on with a

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view to circumvent the defendant, and without any serious design on his part, in good faith to form a partnership, but with the appearance and promise of it, to procure a title to one-half of the marble quarry. And by the dissolution of the partnership, and non-payment of the purchase-money, the consideration has failed.

“By the articles of co-partnership, the defendant was exclusively to take charge of, and attend to the quarry,—quarrying and selling of marble, and delivering of the same. An action of partition has been brought, and is recently discontinued by the plaintiff. An action of detinue for the deed was brought by the plaintiff, and is also discontinued. An action of account render, was also brought by the plaintiff, and is now depending before arbitrators.”

The whole of the evidence thus offered on behalf of the defendant was rejected by the court, and the jury found a verdict for the plaintiff, for “one undivided half part of twenty acres and forty perches, being the premises in the declaration mentioned, with six cents damages and six cents costs.”

Motions in arrest of judgment, and for a new trial, were then made on the part of the defendant, for which the following reasons were filed :

Reasons in arrest of judgment:—1. That the verdict is for an undivided half part of twenty acres and forty perches ; whereas, the declaration is for twenty acres and forty perches of land.

2. That the judgment is for the plaintiff, whereas, it should have been for the defendant.

Reasons for a new trial:—1. That the court rejected evidence [*374] which was offered by the *defendant, as set forth in the paper hereto annexed, and rejected every part thereof.

2. That the court decided that the facts, circumstances, and allegations set forth in the said paper were insufficient, if fully proved, to prevent the plaintiff from obtaining a verdict.

3. That the court decided that the facts proved by the plaintiff were sufficient to entitle him to a verdict, and that his right would not be interfered with by any proof of the circumstances, or any of them, which are set forth in the paper above referred to.

4. That the defendant was entitled to give evidence of fraud and circumvention, and failure of consideration, as set forth in the said paper. But the court refused to permit such evidence to be given.

5. That no actual ouster was proved by the plaintiff, so as to entitle him, as a tenant in common, to maintain an ejectment against his co-tenant in common.

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6. That the verdict is for an undivided half part, while the declaration is for twenty acres and forty perches of land.

7. That the verdict is for the plaintiff, while it should have been for the defendant.

These motions having been overruled, the defendant appealed to the court in bank, where the same reasons which had been relied upon in the Circuit Court, on the motions in arrest of judgment and for a new trial, were filed in support of the appeal.

After argument by *P. A. Browne*, and *J. R. Ingersoll*, for the appellant, *Kittera*, for the appellee, was relieved by the court, whose opinion was delivered by

GIBSON, C. J.—As there was ample evidence of delivery as well as of an ouster of the grantee, and as it has already been ruled in a case like the present, that the plaintiff may recover according to his title, it but remains to be determined whether the proposed evidence of fraud was sufficient to set aside the conveyance in equity. There was no allegation of fraud appearing from the intrinsic nature of the contract; for the consideration which is usually the test of that, appears to be a reasonable one: nor from the condition of the parties; for they stood in the relation of brothers of mature age, free from the pressure of necessities, and labouring under no apparent infirmity; nor from the nature or circumstances of the transaction, as being a fraud upon others; for none but the immediate parties were concerned in it, either in interest or feeling. If there was fraud at all, then it must have arisen, according to the classification of Lord Hardwicke, in *Chesterfield v. Jansen*, from circumstances of actual and positive imposition. In what do these consist? They consist, said the same great authority, in the suggestion of a falsehood, or the suppression of a truth. What, then, is the suggestion or suppression contained in the evidence of circumstances rejected? The parties were partners when the defendant purchased on separate account the marble quarry, which is the subject of the action, the purchase-money being raised by a loan on the credit of both. *The partnership being dissolved, the plaintiff being pressed for payment of a heavy balance to the defendant, gave notice of measures meditated by him to release himself from responsibility as the surety of the defendant. So far, there is no pretence of fraud. The dispute was merged in a new partnership, by which the defendant became jointly interested with the plaintiff in his business as a marble mason, and the plaintiff became, for a consideration to be paid in money, a joint proprietor of the quarry, which was

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conveyed on terms by which the defendant was to superintend the working of it, while the plaintiff was to superintend the sales at the yard in Philadelphia. On being pressed for his share of the purchase-money, the plaintiff denied the partnership, his own indebtedness, kept exclusive possession of the yard, and set the defendant at defiance. This is the whole case; for the subsequent credit surreptitiously obtained by the plaintiff, has no connection with the conveyance. The gist of the supposed fraud, then, is in the concealment of an imputed plan of acquiring the property, and refusing to perform the agreement which was the consideration of it. But this plan, if it really existed,—and it can be inferred only from subsequent acts—was an impracticable one, for the law would compel him to perform his agreement, whatever his determination in respect to it might have been. No one would contend that, to deny the execution of a bond or mortgage given for purchase-money, would entitle the vendor to a rescission of the conveyance; yet what, in principle, is the present case, beside? *Chesterman v. Gardner*, 5 Johns. Ch. R. 33, was a much stronger case, even than that; for there subsequent acts of the defendants, in respect of which the law had provided neither guard nor remedy, were found to have put the plaintiff in a condition of jeopardy, which he certainly had not anticipated, which nevertheless may have been meditated by the defendants at the execution of the deed. The case was this. The owner of a mortgage, who, together with the owner of the equity of redemption, had leased the premises for a term of years with covenant for quiet enjoyment, assigned the mortgage to one who procured a decree of foreclosure and sale, the lessee becoming the purchaser, and depriving himself of recourse to the covenant by merging his term in the fee. His bill to compel the lessors to account with him for the loss sustained by being deprived of the benefit of his lease, was dismissed, because, as the chancellor said, the fraud which is to afford relief, means fraud at the execution of the deed; and that the cases on the subject do not refer to subsequent and distinct transactions, which do not affect or impair the good faith which was felt and intended when the conveyance was executed. It is true the lessee had voluntarily relinquished the security of his covenant; but even that circumstance reduces the case but to the principle of the one at bar; and it may safely be asserted, that the meditation of a fraud which is incapable of consummation, is no ground for a rescission of the contract.

Judgment affirmed.

Cited by Counsel, 7 W. 233; 3 W. & S. 263.

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Hickman *against* Caldwell.Black *against* The Same.

APPEAL.

If a *feri facias* be issued, and returned "Levied as per inventory," &c., with an inventory annexed thereto, and immediately after its return an *alias feri facias* be issued on the same judgment, and put into the sheriff's hands, with instructions from the plaintiff's attorney to stay proceedings for the present, the object being merely to secure the debt due to his client, it must be postponed to a *feri facias* subsequently issued by another creditor, which has been duly acted upon.

THIS was an appeal from the decision of the Court of Common Pleas of Delaware county, in the distribution of the proceeds of real estate sold by the sheriff under execution.

From the record it appeared, that on the thirtieth of December, 1830, a judgment was confessed in the Court of Common Pleas of Delaware county, by John Caldwell, in favour of Ann Black, on a bond of the same date, conditioned for the payment of six hundred dollars on the same day. On the following day a *feri facias* issued on this judgment, which was placed in the hands of the sheriff, with instructions, which, with the manner of making the levy, and taking the inventory, will appear hereafter. This *feri facias* was returned to January Term, 1831, (on the 17th of January) "levied as per inventory," &c., and an inventory was attached to the writ. On the twenty-first of January, 1831, Ann Black issued an *alias feri facias* on her judgment, and placed it in the hands of the sheriff, with instructions, which will also appear hereafter.

On the fifth of February, 1831, Francis Hickman obtained judgment against John Caldwell, issued a *feri facias*, on which the real debt indorsed was three hundred and thirty-four dollars and fifty cents, with interest from that date, placed it in the hands of the sheriff, and directed a close levy to be made, and the property sold. The sheriff, conceiving from what had taken place, that the proceedings under Ann Black's execution had been stayed in such a manner as to give Hickman's the preference, proceeded to levy, advertise, and sell, on the execution of the latter, on which he returned, "levied the debt and damages within specified, &c., and that he has the moneys," &c.

To the *alias feri facias* of Ann Black, he returned, "levied the sum of five hundred and fifty-nine dollars and twelve cents,

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part of which is subject to the payment of Hickman's execution, and leaving only two hundred and one dollars and eighty-seven cents, to be applied to the payment of costs, and part of the debt on Mrs. Black's execution."

After some delay the money was paid into court for distribution by the sureties of the sheriff, he having become insolvent.

[*377] *On the twenty-ninth of February, 1832, a rule was obtained on behalf of Hickman to show cause why he should not take out of court the amount for which his execution issued; and on the twenty-eighth of May, 1832, a similar rule was obtained on behalf of Mrs. Black, the object of which was to enable her to take out, under her execution, all the money which had been paid in.

It was agreed by the counsel, that the notes of the evidence taken in the Court of Common Pleas by Judge Darlington, should be received on the appeal. The material parts of the evidence only need be stated.

John Broomshall, esquire, the late sheriff, testified, that the first inventory he received, was obtained through Caldwell, who came down to his house, and gave him a correct account of the property. He told the sheriff it was not worth while to go on to the property, he was going to break, was insolvent, and would have to be sold out. William Martin, esquire, (the attorney of Mrs. Black,) took the account of the property, and gave him the schedule. The sheriff had his instructions from Caldwell, who observed, that he was insolvent. Mr. Martin told the sheriff to hold on to that writ; it was not their disposition to sell Caldwell out, it was only to make Mrs. Black safe. Some time subsequent to this, another *feri facias* was put into the sheriff's hands at the suit of Hickman, with orders to go on and sell; to make a close levy; to pay no attention to the former levy; to make a new and a strict one. Under the last-mentioned writ, he sold and made a return. The sheriff stated that he should not have sold on that execution, if Mr. Martin had not directed him to stay the proceedings on Ann Black's execution. An *alias feri facias* on Mrs. Black's judgment was put into his hands in court by Mr. Martin, who requested him not to return the first execution until he had delivered him that. He said he had no disposition to sell Caldwell out; he only wanted to hang on to the property to make themselves secure. The goods were left with the defendant, before Hickman's execution came out. The sheriff was not on the premises at all, until Hickman's execution was sued out; his deputy was there when the levy was made under that execution. There was no previous levy.

On his cross-examination the sheriff stated, that he did not

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recollect whether Caldwell was present when the inventory was attached to the *feri facias*. He recollected Caldwell's telling him that he was going to break, and had employed Mr. Martin as his attorney. Mr. Martin was not then present.

The witness further stated, that Caldwell brought him the list, but being aware that there might be a difficulty, he sent his deputy out to make a close levy, which he did, and it was annexed to the writ, but it was not the one then attached to it. He made the return on the faith of his deputy. The *alias fieri facias* he stated, was issued immediately on the return of the original *feri facias*. When Hickman's execution came into his hands he did not inform the person who *brought it that he had Mrs. Black's. He went to Mr. Martin, [*378] and did not inform him that an execution had been put into his hands at the suit of Hickman. He went to Mr. Martin to know what he was to do with the *alias fieri facias*, and whether he was to go on and sell or not. Mr. Martin told him he wished proceedings stayed. The witness added, that he knew the proceedings were ordered to be stayed. He had the *alias fieri facias* in his hands at the time. After the advertisements were set up, Mr. Martin went to the sheriff and asked him, what writ he was selling under. He answered, Hickman's. Mr. Martin then said, you must go on and sell under Mrs. Black's. The sheriff answered, that he would make return of the balance of the money to her.

Jonathan Vernon, who was also affirmed on the part of Hickman, stated, that the sheriff and Mr. Martin were talking in Irvin's bar-room, and the sheriff called on the witness to take notice of what he said. He then asked Mr. Martin whether he should go on with the sale of John Caldwell's property or not? Martin said no—"No; stay proceedings."

Samuel R. Lamplough testified, that he was the deputy sheriff, and went to levy on the property at the suit of Hickman. He never went to make a levy on it at the suit of Mrs. Black. He never went on that business more than once.

It was proved or admitted that John Caldwell and Mrs. Black were half brother and sister, and lived together.

On the part of Mrs. Black, William Martin, esquire, was affirmed, and stated that he was the attorney of Mrs. Black, in relation to the *alias fieri facias*: That in the conversation which took place at Irvin's the sheriff called upon him to know whether he should go on immediately with the execution at the suit of Ann Black against John Caldwell, and whether he should immediately advertise and sell: That he told him, "it was not the wish of the plaintiff to sell the property of the defendant at that present time: That it was the dead of winter, and prop-

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erty would sell better at another period : That he would give him instructions when he wanted him to sell : That Mrs. Black did not want to press her brother if she was secure in her debt :” That the sheriff then called Mr. Vernon, and mentioned to him, that he wanted him to take notice, that he (the witness) had ordered the proceedings stayed : That he remarked to the sheriff at that time, or immediately after, that Mrs. Black wanted the proceedings stayed for the present moment or time, so far as regarded advertising, and proceeding to sale : That he called, as he thought, the next day, on the sheriff, who was sick in his chamber, and told him he had learned that another execution had been issued and he supposed he would go on with the sale whether they were disposed or not : That in Irvin’s bar-room the sheriff did not inform him that another execution had been issued, nor did he know it until the next day : That when the first *feri facias* was issued, the sheriff and Caldwell came to him in the prothonotary’s office, and at the request of the sheriff he made [*379] the *inventory attached to the writ, Caldwell mentioning the articles : That he also drew up the return to the *feri facias*, at the request of the sheriff, as he had done in many other instances : That the return was made on the last day on which the writ was returnable : That according to his recollection, the *alias feri facias* did not issue until a day or two after the return day of the first writ, and he did not recollect having given the *alias feri facias* to the sheriff himself, nor having given him any particular instructions with regard to it until the conversation at Irvin’s, though he might have done so : That he mentioned to the sheriff on several occasions, that it was not the disposition of Mrs. Black to distress her brother, if she could avoid it, but she wanted to and would save herself if possible : That he believed the general direction was given on the first execution that he would give the sheriff notice when they wished a sale : That he thought Mrs. Black and Mr. Caldwell both applied to him to take out the execution, but was not positive with regard to that, nor whether they were both present when the judgment was signed : That Caldwell mentioned that he owed his sister so much money, six hundred dollars, and he wished the witness to secure it for her : That he (the witness) said, if Caldwell would confess a judgment, he could issue an execution and sell the property ; no other plan, he thought, was proposed ; nothing was said, he believed, about a bill of sale, but of this he was not certain ; the sister said she did not wish to sell her brother’s property immediately, if she could be secured without it : That he thought there was no agreement, but the matter was left altogether to his discretion to press the sale or et the execution stand, as he saw proper : That he prepared the

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bond on which the judgment was entered, and his impression was, that Mrs. Black was present: That he supposed the conversation with the sheriff was on the fifth of February, 1831, the day Hickman's execution was issued, and that the sheriff had just received it.

Upon the evidence above stated, the Court of Common Pleas, after argument, decided that Ann Black was entitled to all the money in court, and Francis Hickman appealed from the decision.

The exceptions filed in the court, were—

1. That the facts of the case prove, that the executions of Ann Black were intended merely as a cover to the property of the defendant.

2. That the facts and returns show, that the execution of Francis Hickman was entitled to a legal preference, and it was postponed by the Court of Common Pleas to the execution of Ann Black.

Dick and Dillingham, for the appellant, cited Starkie on Ev. part 4, page 1350; Hob. 206; *Shewell v. Fell*, 3 Yeates, 17; s. c. 4 Yeates, 47; *Smallcomb v. Buckingham*, 1 Salk 320; s. c. 1 Ld. Raym. 251. Act of 16th of April, 1827, *Purd Dig.* 476; *Howell v. Alkyn*, 2 Rawle, 286; *Mechanics' Bank v. Fisher*, 1 Rawle, 341; *Cowden v. Brady*, 8 Serg. & Rawle, 505-510; 6 Ba. Ab. 179; *Snyder v. Kunkleman*, 3 Penn. Rep. 487; *Barnes v. Billington*, 1 Wash. C. C. Reps. 29; *Berry v. Smith, 3 Wash. C. C. Reps. 60; 2 Kent's Com. 524; [*380] *Bond v. Gardener*, 4 Binn. 269.

S. Edwards and Tilghman, for the appellee, relied principally upon *Howell v. Alkyn*, 2 Rawle, 282.

The opinion of the court was delivered by

GIBSON, C. J.—This case is said to have been ruled below on the authority of *Howell v. Alkyn*, 2 Rawle, 282; and ruling it by the principles assumed by the judge to whom was assigned, in that case, the duty of pronouncing the judgment of the court, instead of ruling it by the point directly decided, the conclusion drawn by the President of the Common Pleas, could not well have been avoided. I feel bound to say, however, that those were not the principles of the cause as settled in consultation, the circumstances intended to have been made the test, being the same that had been applied in *Eberle v. Mayer*, 1 Rawle, 366, and that has since been applied in the *Commonwealth v. Stremback*, 3 Rawle, 341, to wit,—the presence or the absence of a direction to stay proceedings on the levy. There was no

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such direction in *Howell v. Alkyn*; and the mere sufferance of procrastination by the officer, was held not to be fraudulent *per se*. Had the exact bearing and extent of the principles laid down in the opinion delivered, been perceived at the time, the disclaimer would have been made then, which I feel it a duty to the profession and the court to make now. I am happy to have the authority of my brother Rogers, the other survivor of the judges who then composed the court, for the entire accuracy of this statement, and for saying that the principles laid down by my brother Huston were peculiar to him. Then, without intimating an opinion on the point made here, in relation to the supposed effect of the return on the rights of the parties, we will determine this case, as we have determined all others of a similar nature, by an application of the test just mentioned. The principle of this test is, that to levy with directions to proceed no further, can be referred to no object but the creation of a lien which the law does not tolerate. What was the object here? Ann Black, who claims priority, put her *fieri facias* into the hands of the sheriff, with instructions that will presently be stated, on the 31st of December, 1831, which was returned at the January Term succeeding, "levied as per inventory." Immediately after this return was made into office, an *alias fieri facias*, which was not the next process in order, and which is therefore a suspicious circumstance, was issued to the succeeding term. Hickman put his execution into the sheriff's hands on the 5th of February, with directions to proceed promptly, make a close levy, and sell the property. To this execution the sheriff returned, "Levied the debt and damages within specified, &c., and that he has the money," &c. To Black's *alias* he returned, "Levied the sum of five hundred and fifty-nine dollars twelve cents; part of which is subject to [*381] the payment of *Hickman's execution, and leaving only two hundred and one dollars thirty-seven cents to be applied to the payment of costs and part of the debt on Mrs. Black's execution." Thus stands the case on the written evidence of the writs and returns. The parol evidence makes it perfectly clear that there was an actual plan on the part of Mrs. Black, her attorney, and the debtor, who was her brother, to use her execution, not only for purposes of present security, but to cover the property for a time from other creditors. The sheriff testifies, that he received his instructions from the debtor himself and the plaintiff's attorney, and that they furnished him with a list of the property, the debtor saying, it was not worth while to go to the house; that he was insolvent, going to break, and must be sold out; and that he would give the sheriff a correct account of the property. The sheriff

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further testifies that the attorney made the schedule and delivered it to him, desiring him "to hold on to that writ," and saying it was not his client's disposition to sell Caldwell out; it was only to make her safe. The officer swears he would not have sold on the second execution, if the attorney had not directed him to stay proceedings on the first: That when the *alias* was put into his hands in court, he was requested not to return the preceding execution till the attorney had delivered him that, as his client had no disposition to sell the debtor out, but only to make herself secure: That the debtor said he had made Martin his attorney; and that Martin had ordered the proceedings to be stayed. There was much more to the same effect, the order to stay being further proved by Vernon, a witness present when it was given. Martin corroborates the testimony of the sheriff, and says, he told him when the latter called for instructions, that it was not the plaintiff's wish to sell the property "at that present time; that it was the dead of winter, and the property would sell better at another time, and he would give him instructions as to the time; and that the plaintiff did not want to press her brother if she were secure of the debt, but wanted the proceedings stayed for the present, so far as regarded advertising and proceeding to sale." He proved, however, that he ordered the sheriff to proceed promptly as soon as he discovered that there was a conflicting execution in his hands; and that both Mrs. Black and Caldwell applied to him to issue the execution, the latter admitting he owed her six hundred dollars, and the former desiring the attorney to have it secured.

This is the substance of the case, given for the most part in the words of the witnesses; and it shows, not only a stay of execution pursuant to an order of the execution creditor, but a clear preconcerted plan, not only to levy the execution as a security, but to keep the other creditors at bay; so that it is unnecessary to say, that it presents one of the strongest instances of legal fraud that can be imagined. It is ordered, therefore, that the decree of the court below be reversed; and that the money in court be applied in the first place to Hickman's execution, leaving the surplus for that of Mrs. Black.

Decree reversed.

Cited by Counsel, 1 Wh. 122; 5 Wh. 152; 7 W. & S. 66; 8 W. & S. 389 457; 4 Barr, 155; 14 S. 449.

Cited by the Court, 5 R. 290; 5 W. 302; 7 W. 77.

Cited by Lower Court, 11 N. 275.

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*[PHILADELPHIA, FEBRUARY 17, 1834.]

M'Williams, Administratrix of M'Williams, *against*
Hopkins.

An administration bond, in which there is but one surety, is *ipso facto* void.

But if a suit be brought under letters of administration founded on such a bond, against a defendant who gives insufficient bail, of the entry of which the attorney of the plaintiff does not give him notice, and thus he is prevented from excepting to it, and after the defendant has absconded, judgment is obtained against him, an action may be maintained against the attorney for neglect of duty.

And if the attorney in the suit brought against the attorney in the original suit, be guilty of a neglect of duty, a suit will lie against him, notwithstanding no valid letters of administration have been granted to the plaintiff; because the latter suit was for no duty owing to the intestate, but for an implied promise to the plaintiff himself, that his attorney would conduct his action with reasonable diligence and skill; and naming himself administrator is surplusage, or at most matter of description.

THIS was a motion to set aside a non-suit directed by the Chief Justice at Nisi Prius.

The case was this. Mary M'Williams, the plaintiff, administratrix of James M'Williams, deceased, brought suit against one Clark for embezzling the effects of the deceased. She employed Samuel Ewing, esquire, as her counsel, who obtained judgment against Clark, but in consequence of his alleged neglect, and violation of instructions, the plaintiff derived no advantage from the judgment, Clark having escaped by reason of the insufficiency of his bail. The imputed neglect was an omission to give the plaintiff notice of bail having been put in, by which the plaintiff was prevented from excepting to them on the ground of insufficiency.

The plaintiff brought suit against Mr. Ewing for this alleged violation of orders and neglect of duty, and in this suit employed Joseph R. Hopkins, esquire, the present defendant, as her counsel, who received a fee, entered his name on the record as her attorney, was often consulted in reference to the suit, and filed a declaration, but in consequence, as was alleged, of his neglect to file a declaration for more than a year, though often requested to do so, the defendant in that suit, Mr. Ewing, entered a *non pros*. Mr. Hopkins, it was alleged, continued for two years afterwards to act as the counsel of the plaintiff, encouraging her to believe that the cause would speedily come to trial, and giving her no notice of the non-suit.

On the death of Mr. Ewing, nearly three years after the suit had been brought against him, the plaintiff discovered the non-suit, and for the neglect imputed to Mr. Hopkins in conducting the suit against Mr. Ewing, the present action was brought.

[M'Williams v. Hopkins.]

On the trial of the cause, the defendant's counsel moved for a non-suit on account of an alleged defect in the plaintiff's administration bond, which was given by the plaintiff with one surety only. The letters of administration granted on this bond, were those on which Mr. Ewing brought the original suit. On the twentieth of November, *1829, a new bond was given in pursuance of an order of the Orphans' Court, [*383] but no new letters of administration were granted.

His honour directed a non-suit to be entered, with leave to move to take it off.

Earle and *D. P. Brown* argued in support of the motion, and *J. Randall* and *J. Sergeant* against it.

The opinion of the court was delivered by

GIBSON, C. J.—The administration bond having been executed but by one surety, the grant of administration which was the foundation of the plaintiff's title to sue in the action against Clark, is, *ipso facto*, void, by the positive and unequivocal declaration of the legislature. It therefore seemed to me at the trial, that the plaintiff had received no actual injury, at the time, from the omission of her attorney to communicate to her the notice of bail, so as to enable her to except to their sufficiency; and that her subsequent recovery of judgment, when the defendant had absconded, could not give her a cause of action which she had not before; and acting on this supposition, I directed a non-suit, with leave to move in bank. On reflection, I am convinced that I ought not to have decided on the probability that the defendant would have perceived the defect in her title, had he remained to contest it, and taken advantage of it. Judging from the plea put in, which would exclude it, the chance is that he would not; and though that might have been changed at the trial, there is not one case in a thousand which brings into view the validity of the administration bond of which there never is a profert. For this reason, the allegation of the plaintiff that her counsel was responsible to her for not having apprised her of the deficiency of the bond, before he brought the suit, is without foundation, the presumption being that the register has done his duty, and the counsel being bound to examine nothing but the immediate foundation of the action. But having obtained a judgment, the presumption on the other hand is, that she was prejudiced by the want of notice of bail, if such were the fact. She is not to be precluded therefore, if she can show negligence, in this particular, in the original action, as well as negligence by the defendant in prosecuting the original counsel for it. It is alleged, however, that the same defect that would have

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defeated her in the original action must defeat her in this, founded as it is on the same grant of administration; which, being void in its creation, continues to be so, notwithstanding the subsequent addition of a surety in the administration bond. The grant is undoubtedly no better than it was at first; but the letters of administration are not the foundation of the present action. She sues here for no duty that was owing to the intestate, but on an implied promise to herself, that her attorney would conduct her action with reasonable diligence and skill. It is true that whatever shall be recovered will be assets; but so would be the avails of a bond or note for the price of the intestate's effects *sold by the administrator, which are [*384] recoverable but in his own right, the naming himself administrator being surplusage, or at most matter of description. The cause is therefore to be put to another jury.

Non-suit set aside.

Cited by Counsel, 4 W. 22; 11 H. 191.

Cited by the Court, 8 W. 225; 7 C. 523.

[PHILADELPHIA, FEBRUARY 17, 1834.]

The Mechanics' Bank of the City and County of Philadelphia *against* Earp.

IN ERROR.

A bank in Philadelphia received on the fifth of October, 1826, from a mercantile house in the same place, one of the members of which was a director of the bank and conversant with its modes of doing business, two drafts, payable ten days after sight, upon two mercantile houses in Virginia, to be transmitted to a bank in Virginia for collection, with instructions as to the manner in which they were to be presented. The bills were drawn by the house which deposited them to their own order, and they indorsed them. They were also indorsed by the cashier of the bank, with a direction to pay them to the order of the cashier of the Bank of Virginia. The day after they were received, the cashier of the bank in Philadelphia inclosed them in a letter directed to the cashier of the Bank of Virginia, in which he stated that "the bills are inclosed for our account." When they were received by the bank in Philadelphia, they were entered in short in the bank-book of the depositors. On the common usage, the note clerk extended the bills in the books of the bank to the credit of the depositors, and a few days afterwards, at the request of the depositors, they were extended in their bank-book. On the eighth or ninth of April, 1827, the depositors were apprised, for the first time, of the non-payment of the bills, and this fact came to the knowledge of the bank in Philadelphia about the twenty-sixth of the same month. The bank-book of the depositors had in the meantime been settled seven times. One of the depositors was a stockholder in the bank in Philadelphia, and on offering to transfer his stock, permission to do so was refused on the part of the bank, under the eleventh article of the act of the twenty-fifth of March, 1820.

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which provides, that no stockholder indebted to the bank, for a debt actually due and unpaid, shall be authorized to transfer his stock or receive a dividend, until such debt is discharged or security to the satisfaction of the directors be given for the same. In consequence of this refusal, the stockholder brought suit against the bank, by whom no tender of the bills had been made to the firm: Held—

1st. That the bank in which the bills were deposited having received them for transmission only, had fulfilled its duty by sending them for collection, with the instruction of the depositors, to the Bank of Virginia, for whose laches it was not responsible.

2. That although the extension of the bills in the books of the bank, and the bank-book of the depositors, was equivalent to payment, yet having been done under mutual mistake, the bank was not bound by it.

3. That the cashier having indorsed the bills, did not alter the legal relation of the parties, or add to the responsibility of the bank.

4. That the settlements of the depositors' bank-book, did not alter the rights of either party.

5. That it was not necessary for the bank to tender the bills to the depositors.

6. That the bank had a right to refuse to permit a transfer of the stock of one of the firm, for a debt due from the partnership

7. That the security for the alleged debt arising from the deposits of the firm, was not such as the bank was bound to take.

8. That even if the firm had a balance in bank more than sufficient to pay the amount of the bills at the time permission to transfer was refused, yet the bank was justifiable, under the circumstances of the case, in refusing to allow the transfer to be made.

*It seems, that if the bank in Philadelphia had entered into a [*385] special agreement, or received a pecuniary reward for its services in collecting the bills, beyond a mere charge to cover expenses, and the Bank of Virginia was its agent for that purpose, it would have been responsible for the neglect of such agent, and an action might have been maintained for damages commensurate with the injury sustained in consequence of such neglect.

THIS suit was brought in the District Court for the city and county of *Philadelphia*, by the defendant in error, Thomas Earp, against the plaintiffs in error, the Mechanics' Bank of the city and county of Philadelphia, and was removed into this court by writ of error.

On the trial in the court below, a great mass both of parol and documentary evidence was given, which was set forth in the bill of exceptions and returned with the record. But as all the facts which are essential to a perfect understanding of the points decided, are stated by the judge who delivered the opinion of the court, any other statement of them is deemed superfluous.

The cause was fully argued by *Bradford* and *Chauncey* for the plaintiffs in error, and by *Scott* and *J. Randall* for the defendant in error.

The opinion of the court was delivered by

ROGERS, J.—In the month of September, 1825, Earps & M'Main, merchants, of the city of Philadelphia; sold to Mot-

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ley, Irvine & Co., of Perkinsville, Virginia, and to Irvine, Montagu & Motley, of Lawrenceville, Virginia, goods and merchandise, for which, when they rendered their accounts, the twentieth of June, 1826, there was a balance against the former house of four hundred and ten dollars and ninety-five cents, and against the latter of three hundred and fifty-two dollars and fifty-three cents. The accounts not being paid, Earps & M'Main, with a view to obtain payment, drew bills on the respective firms, dated the fifth of October, 1826, and payable ten days after sight, with this direction on the bills: "To be presented to H. B. Montagu, Richmond, Virginia, for acceptance. If he is not there, have it forwarded to Irvine, Montagu & Motley, Lawrenceville." The bills being made payable to their own order, were indorsed by Earps & M'Main, and were also indorsed by T. Fitch, cashier of the Mechanics' Bank, to pay to the order of W. Dandridge, esquire, the cashier of the Bank of Virginia. The notes were deposited in the Mechanics' Bank, to be transmitted to their correspondent in Virginia for collection. The cashier of the bank, the day after they were received, inclosed them in a letter directed to W. Dandridge, cashier of the Bank of Virginia, in which he states, the bills are inclosed for our account. The bills, when received, were entered, as is usual, in short, in the bank-book of Earps & M'Main. On the twenty-eighth of October, when a sufficient time had elapsed, according to the common usage of banks, the note clerk extended the bills on the books of the bank, to the [*386] credit of the depositors. Afterwards, perhaps on *the thirty-first of October, at the request of Earps & M'Main, they were extended on their bank-book. Sometime about the eighth or ninth of April, 1827, Earps & M'Main received a letter dated the second of April, from Montagu, from which it appeared the bills had not been paid. This letter they answered on the twelfth, and in their answer express surprise at the contents of his letter, and inform him that they had received payment from the Mechanics' Bank, in the manner before stated. It was, however, not until sometime about the twenty-sixth of April, 1827, that the Mechanics' Bank appear to have been aware of the fate of the bills. Of that date they received a letter from the cashier of the Bank of Virginia, saying, that the two bills had been forwarded as directed: That it had escaped his recollection: That they had not been paid, and that it was probable they would not be paid: That he felt certain, "that they would not be charged without advice of payment." The cashier of the bank replied, that they had passed the amount to the credit of the depositors, and that the Bank of Virginia was liable. The defendants refused to permit Thomas Earp, or the

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firm of Earps & M'Main, to transfer his stock, and for this refusal this suit is brought.

The first question to which our attention was directed, is what duty did the Mechanics' Bank undertake to perform, in relation to these bills? And about this we have no difficulty. The undertaking clearly was, to transmit the bills, with the directions upon them, to their correspondent in Virginia; and on advice of payment, to credit the depositors with the proceeds, or pay over to them the amount. That this was the intention of both parties, is necessarily to be inferred from the nature of the transaction. The defendants did not undertake to collect the bills, but were used as the medium of communication between the depositors, and the collecting bank in Virginia. And this was so held in *Lawrence v. The Stonington Bank*, 6 Con. R. 528. The Eagle Bank, who in that case stood in the same situation as the Mechanics' Bank do here, was considered merely as the instrument of transmission; and in the *Bank of Washington v. Tripplett & Neal*, 1 Peters's S. C. Rep. 25, (which so far as regards this point, cannot be distinguished from the present.) "The bill," says the Chief Justice, "was not delivered to the Mechanics' Bank of Alexandria for collection, but for transmission to the bank in Washington to be collected. That bank would of course become the agent of the holder. By transmitting the bill as directed, the Mechanics' Bank performed its duty, and the whole responsibility of collection, devolved on the bank which received the bill for that purpose. The Mechanics' Bank was the mere channel through which Tripplett & Neal (who in this case were the depositors) transmitted the bill to the Bank of Washington." *Jackson v. The Union Bank*, 6 Harris & John. R. 148, goes on the same principles. In addition in the authorities, which are decided on the common and uniform usage of all banks, we are bound in this case to consider the defendants as an agent for transmission merely. The District Court placed the cause *on that ground, whereas, if it is contended that the Mechanics' Bank undertook to collect the bills, that was [*387] a material fact, which should have been passed upon by the jury. It results from this state of the case, that the banks do not stand in the relation of principal and agent towards each other, but that the defendant was the agent for transmission of the bills, and their correspondent the agent for their collection. It is obvious that this view of the transaction dispenses with the necessity of inquiring in what manner the agency of the latter bank has been performed; for unless the duties of the defendants are more extensive than I have stated, it is clear, that although they are answerable for their own laches, they are

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not bound for the acts of omission or commission of their correspondent in Virginia; and this, it must be remarked, was the opinion of the District Court. The learned judge placed the recovery of the plaintiff on the single ground, that the Mechanics' Bank had not performed its duty; had not done all the law required, and all that Earps & M'Main had a right to expect. He delivered it as his opinion to the jury, "That the cashier of the Mechanics' Bank was guilty of negligence in omitting to conduct and keep up a diligent and skillful correspondence with the Bank of Virginia in relation to the bills: That the defendants undertook to transact the business, and were bound, with or without compensation, to do their part with fidelity, diligence, and skill." This want of legal diligence, I understand, consists in this:—It was the duty of the cashier (as the judge supposes), finding that no intelligence came from their correspondent in Virginia, to have written to the cashier of that bank, and made inquiry as to the fate of the bills. In examining the correctness of this position, it is necessary to recur to the acknowledged duties and liabilities of the defendants. It is conceded, that they are not liable for the acts of their correspondent, and that their undertaking was to transmit the bills to the Bank of Virginia for collection; and surely it cannot be imputed to them that they were guilty of negligence in not forwarding the bills in due time. No negligence or inattention has been charged to them in relation to that part of the transaction. The material facts which bear on this part of the case are these. Thomas Earp, the defendant in error and plaintiff in the action in the District Court, and one of the firm of Earps & M'Main, was a director of the Mechanics' Bank, and was well acquainted with the nature of their business. He knew, that the course of that business was to transmit notes and bills abroad for collection; and that in performing this friendly office for its customers no person ever supposed that it was taking upon itself any suretyship for its correspondent abroad: That this was a service ordinarily performed without compensation, and for this reason, that their duty was to transmit merely. Messrs. Earps & M'Main were the creditors of firms located in Virginia, on debts which had been due for some time; for one of these they held the note of the firm, which was also due. As an experiment to obtain payment, they drew the bills in question, which they placed in [*388] *the Mechanics' Bank, in the manner and for the object before stated. It was an attempt on their part to recover a debt, which was at least doubtful, by means of bills which they had no express authority to draw. The bills were transmitted in due time; there was a short credit on the bank-book of Earps & M'Main, and when the time arrived when they

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had a right to expect that if the drafts were unpaid, they would be informed of the fact, they were extended, according to usage, on the bank-book of Earps & M'Main. At that time, both parties had a right to believe that the money had been paid. They did so believe, and acted under that supposition. It is a case of mutual mistake, and in that view it is immaterial whether the extension be equivalent to payment or not, for where money is paid under a mistake of facts, it will not be denied that it may be recovered back. Nor is it of any consequence, whether there was any special agreement to refund, as the law raises the promise to repay. Until some time in April, none of the parties in interest were aware of the real state of things, nor had anything occurred which would induce a suspicion of the fact of non-payment. It is material to observe, that the banks to whom bills are transmitted for collection, do not advise their correspondents of the payment of the bills, although they invariably do of their dishonour. This is the admitted practice. When, therefore, nothing is heard from their correspondent, they have a right to believe they have been paid. Of this course of business, Messrs. Earps & M'Main, the customers of the bank, were aware. Why should the Mechanics' Bank (as the judge supposes was their duty) write to the Bank of Virginia, to know what had become of the bills? They supposed, as they had a right to do, that they had been paid. In that belief, (which they held in common with the depositors,) in honesty and good faith, they paid the money, or, which is the same thing, extended the amount to their credit. No rule of commercial law has been shown, which obliges a bank to use greater diligence. If the Mechanics' Bank was mistaken, so were Earps & M'Main. It was not the duty of the bank to write, because both parties believed, as they were warranted in believing, that the bills had been paid. The law does not require from an agent anything which is unreasonable or unnecessary. If then the bank is treated as an agent for transmission merely, I am at a loss to see in what respect they have been guilty of negligence. All the duty which the law exacts from an agent has been performed with the requisite diligence, promptness, and skill. If they are to be considered as an agent, acting without compensation, they have a right to complain of the strictness of the rule applied to them at the trial. In strictness of speech, negligence is not permitted in any contract; but a less rigorous construction prevails in some cases than in others. The law considers diligence to be, in some sort, a relative term; and it must be judged from the nature of the bailment and all other ingredients which may fairly be presumed to enter into the contemplation of the parties.

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[*389] He who asks a favour, has a right to expect to *be absolved from a proportionate care; and he who accepts a burthen, has a right to demand that he shall not be required to be as scrupulously exact as if he received a benefit. Story on Bailments, 12; Jones on Bailments, 8.

But, it is said that the cashier having put his name on the bills, the legal relation of the parties has been changed: That by the indorsement, it became a foreign bill of exchange, and, as such, subject to the strict and arbitrary rules applied to such commercial paper. This is viewing the transaction through the medium of form, without attending to its essence. The office and undertaking of the bank, as has been before observed, are to transmit the bills, with the directions upon them, to their correspondent; and, on advice of payment, to pay over the proceeds. Thomas Earp, who was a director, was aware of the nature of the undertaking, and that in performing for its customers this office, it did not become surety for their correspondent abroad; and that in indorsing the bill, they did not intend, as between the depositors and themselves, to assume any new liability, or impose upon themselves any other duty than to transmit the bills to their correspondent in Virginia, and to credit them with the proceeds when received: That this was the form in which such business is usually transacted, adopted with a view to effect the object which both had in view, and that the reason they were indorsed by the cashier was, to enable their correspondents to credit them with the amount when received.

The deposit of a bill in one bank, to be transmitted to another, is a common usage, of great public convenience to the commercial world. The mode pursued here is believed to be common to all. If, therefore, an indorsement has the effect contended for, it is a matter of great public concern that it should be distinctly understood. The consequence will be, either that the practice of transmitting bills will cease, to the great injury of commercial dealers, or that banks will charge for their services, in proportion to the increased risk to which they are exposed. That the law has not been so understood, must, I think, be admitted; nor can I believe that either the bank or Messrs. Earps & M'Main, supposed for one moment that these bills were to be governed by the strict rules of the commercial law, as to foreign bills of exchange. To enable the plaintiff to avail himself of the form, without the substance, would be to give the transaction an effect, not within the contemplation of either party. It is certainly true, as is stated by Lord Ellenborough in *Leadbeater v. Farran*, 5 M. & S. 349, that if an agent sign only his own name, whether as drawer, indorser, or acceptor, he will (unless in the case of a government agent, contracting in its behalf) be

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considered as the principal, and be personally liable as such, unless he add some restriction or qualifying words, as "*sans recours*," or "without recourse to me," or "drawn or indorsed to transfer the interest only, and not to incur any personal liability;" for it is an universal rule, that a man who puts his name to a bill, thereby makes himself liable, unless he states *on the face of the bill, that he subscribes it for another, or by procuration of another, which are words of exclu- [*390] sion. These principles have been carried to a great length in some recent English decisions. It has been held, that if a broker sell goods, and draw on the buyer in favour of the principal, he will be liable as drawer upon the bill if it be dishonoured, unless he use special words to prevent it, and may be sued, even by his employer, although he received no guarantee commission, or other remuneration, for incurring such personal responsibility. *Le Fevre v. Lloyd*, 5 Taunt. 749. And if a person be employed by the plaintiff to purchase bills for him, obtains them payable to himself, and indorses them generally, he will be liable upon the indorsement, even to his own employer, although he had no guarantee commission. The court observed in one case, that the brokers, by giving the bill, put an end to all doubts as to the buyer's responsibility; and in another case, that the defendant might have specially indorsed the bill "*sans recours*," and not having thought fit to do so, he was personally liable. So far as the decisions subject an agent to personal liability, as regards third persons, they do not admit of question, and if the observations of Lord Ellenborough are taken with this qualification, they are without objection; or if it be intended to put the cases cited upon the special facts, or to say that at law they are liable to their employers, it is unnecessary to dispute their authority; but if it is intended to decide that the agent is liable to his employer, under such circumstances, and that equity would not grant relief, an examination into the propriety of the decision may give rise to a different opinion. As between the employer and the agent, it is without consideration; and this is a ground of equitable relief. I cannot see the policy of applying the strict rules applicable to bills of exchange to such a case. And I have no hesitation in saying, that in Pennsylvania, where we have no court of chancery, the agent would not be liable to his principal from the circumstance merely that he had indorsed the bill without disclosing the fact of agency, by a special indorsement. Chitty, in the last edition of his Treatise on Bills, page 39, notices the cases referred to, and in respect to them holds this language: "It seems questionable whether, even at law, it is correct to allow an employer to recover from an agent, under such circumstances, because in general between

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the original parties, it may be shown, as a good defence at law, the bill was drawn, accepted, or indorsed for the plaintiff's accommodation, or for a purpose or consideration which has failed, or been satisfied. *Ex parte Robinson*, 1 Buck, 113. And to allow such a principal to recover at law against his agent, is only to compel the latter to resort to a court of equity for relief; for where an agent, in the course of his employment as such, procured a banker's bill, which was actually drawn in his favour, and indorsed by him to his employer, who deposited it with a banker, who gave credit for the amount, but was cognizant of the manner in which the bill had been indorsed, the [391] Court of Exchequer restrained an action brought by *the banker on the bill against the agent as indorser. *Kidson v. Dilworth*, 5 Price, 564. And where a person employed to get a bill discounted, being unable to effect it without indorsing it, therefore indorsed it in his own name, it was held, that he was entitled to be indemnified by his employer, though the latter's name was not on the bill, and a claim and proof under a commission of bankruptcy were allowed accordingly."

The court looks beyond the face of the bill. We regard substance, not form. In the case at the bar, as presented to us on the record, the only duty of the bank was to transmit the bill. It was neither accepted nor paid; and if any negligence has occurred, it is not to be imputed to the defendants, but to their correspondent, for whom they are not responsible.

It is urged, as a reason to prevent the reversal of the judgment, that there had been seven settlements between the parties, and it is true, that the bank-book of Earps & M'Main has been settled seven times. But that is not such a settlement as can alter the rights of either party. The accounts are still open to examination and correction. There is no pretence to say, that either intended any such effect.

It has been contended, that the bank should have tendered the bills to Earps & M'Main; but for what purpose, I do not understand. The debt, as between the original parties, remains unchanged. It would be no defence for them that these drafts were outstanding. As nothing was paid for it, it was neither an equitable nor legal assignment of the debt. The bank neither did, nor did intend, to become purchasers of the drafts. It remains now to notice an objection which has been pressed upon the attention of the court by the counsel for the defendant in error.

The eleventh article of the act of the twenty-fifth of March, 1820, provides, that no stockholder indebted to the bank for a debt actually due and unpaid, shall be authorized to make a transfer or receive a dividend, until such debt be discharged,

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or security to the satisfaction of the directors be given for the same. The objections are three. 1st, That the bank had no right to refuse a transfer of the stock of one of the firm for a debt due from the partnership. 2d, That they had an ample security, arising from the deposits of the firm, for their debt,—and, 3d, That the firm was not in debt to the bank, because the amount deposited to their credit was greater than the sum now in controversy. As to the first objection, we think, that as the separate property is liable for the debts of the firm, the act was intended to give the bank a lien not only on the joint stock, but also on the stock held by each member of the partnership. The directors had a right to choose between them. Of this Mr. Earp has no reason to complain. Nor do we think there is anything in the second objection. The bank had no lien on the deposits. It was for Mr. Earp to offer reasonable security. If reasonable security had been offered and refused, of which the jury would doubtless be the *judges, the plaintiffs [*392] would have had a right of action. But no such offer was made, for if it had been, we should not have been troubled with this case.

The third objection is grounded on the assumption of a fact denied by the other party, viz., that they had a balance in bank more than sufficient to pay the amount of these bills. If there was a doubt about the fact, it should have been submitted to the jury, with a direction from the court on the point of law. But as this case must go to another jury, the parties have a right to the opinion of this court, on the supposition that the fact is as stated by the counsel for the defendant in error. The question is, were Earps & M'Main at the time the bank refused to permit the transfer, indebted to the bank for a debt actually due and unpaid, within the meaning of the act of the twenty-fifth of March, 1824? The case supposes, that on a settlement of accounts, there was a balance in favour of the firm, allowing the bank credit on account of the bills: That instead of Earps & M'Main's being indebted to the bank, the bank was indebted to them: That the proper course was, not to refuse permission to transfer, but to withhold payment of so much of the deposits of the firm as was required to pay the amount of the bills improperly credited in account. If the bank had dishonoured the plaintiff's check, it would have been a much harsher proceeding than the course pursued. Still, the plaintiff may stand on his legal right. The point is not without difficulty, but I have come to the conclusion, that the bank was justifiable, under the circumstances of the case, in refusing to permit the transfer. If the firm had been indebted on the note discounted by the bank, they would have a lien on the stock, without regard to the

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amount of their deposits. It would be open to them to adopt one of two courses—either to have charged the amount of the note, or to have relied for their security on the lien which the act gives them. The extension on the books of the bank was equivalent to payment. These funds have been used as other deposits. It then becomes a debt, within the meaning of the act.

It cannot but be observed, that the basis of the opinion of the court, is, that the Mechanics' Bank was an agent for the transmission of the bills: That their only duty was to forward the bills and credit the proceeds when received. If, however, on another trial, the jury should believe, under the direction of the court, that the parties entered into a special contract, different from the general usage, to collect the bills: That the Bank of Virginia was not alone their correspondent, but agent for that purpose, then a different case will be presented. In such an inquiry, the proof of the fact of such an engagement will lie on the plaintiff, and it will be material for him to show, that the bank received compensation for their services in collecting the bills. I say compensation for their services in collecting the bills, for a charge of one-half or three-quarters per cent. to cover expenses and difference of exchange will not affect the question. If the undertaking of the bank was to collect, and [*393] not merely to transmit, *they would be answerable for their Virginia correspondent; and this I understand to be the principle of the case of *Van Wait v. Wooley et al.*, 3 Barnwell & Cresswell, 439; 10 Com. Law Reps. 145, so much relied on by the counsel of the defendant in error. Abbot, Chief Justice, delivered the opinion of the court, and after stating the facts, proceeded as follows: "Upon this state of facts, it is evident that the defendants, (who cannot be distinguished from, but are answerable for their London correspondents, Sir John Lubbart & Co.) have been guilty of neglect of the duty which they owed to the plaintiff, their employer, and from whom they received a pecuniary reward for their services. The plaintiff is therefore entitled to maintain his action against them, to the extent of any damage he may have sustained by their neglect. *Tweed v. The Bank of Utica*, 20 Johns. R. 372; and *Van Wait v. Smith & Holly*, 1 Wend. 219, are referred to for the same principle. If the jury should be of the opinion, that the Mechanics' Bank undertook to collect the money, then it will be necessary to inquire, whether the Bank of Virginia has done its duty, and what is the extent of the liability of the defendants. Until then, we think the expression of any opinion would be premature, except so far as to state, that the bank would be liable in damages only as any other agent to his prin-

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cial, to the extent of the damage which may have been sustained by their neglect, as has been abundantly shown by the authorities cited at the bar.

Judgment reversed, and a *venire de novo* awarded.

Cited by Counsel, 6 Wh. 22; 5 W. & S. 375; 1 J. 123; 11 H. 23; 2 S. 208; 11 S. 71; 15 S. 123; 23 S. 63; 14 W. N. C. 532.

Affirmed, 5 Wh. 298.

Cited by the Court, 4 Wh. 112; 10 Barr, 109.

*[PHILADELPHIA, FEBRUARY 19, 1834.]

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Stiles *et al.* against Bradford.

IN ERROR.

A deposition read by one party on the argument of a rule to show cause why a feigned issue should not be directed to try his right to money in court, cannot be read in evidence by the opposite party on the trial of the issue, when the witness is himself in court, and capable of being examined.

Perhaps the reading of the deposition might be deemed an admission of the competency of the witness, so far as respects existing objections on the side of the party reading it, but it cannot be deemed such an admission of its contents, as to supercede the rule that the best evidence in the power of the party must be given.

On the trial of a feigned issue, to try the right of B. to have and receive, according to the amount of his liens, (under the revival by *seire faciens* of certain judgments, the lien of which had expired by lapse of time) the money in court, in which it was agreed that the defendants in the issue should be entitled to the benefit of any question that might arise in relation to the lien of a judgment of revival, or under the original judgment, the defendants cannot inquire into the consideration of such judgments, or travel into the cause of action on which they were founded.

Where real estate held in the name of R. but really the property of T. is mortgaged by R. at the instance of T. and for his benefit, T. is the real mortgagor; and if it be sold by the sheriff by virtue of proceedings on the mortgage, a judgment creditor of T. is entitled to the surplus proceeds of the sale, in preference to a subsequent judgment creditor of R. who at the time of obtaining his judgment, was acquainted with all the circumstances of the ownership of the property, and of its being held by R. for the purpose of evading prior judgments against T.

Notice given by a judgment creditor of T. at a sheriff's sale of a leasehold interest as the property of R. that it was not really the property of R. but of T. and that his judgment was a lien upon it as such, is not an election to resort to that source for payment, and a waiver of his right to a fund on which he has a good claim, and which is available for the payment of his debt.

Under the act of the sixteenth of April, 1827, "relative to the distribution of money arising from sheriffs' and coroners' sales," the court has a right, where the estate has been sold as the property of R. under process against him, but is alleged to have been really the property of T., to direct a feigned issue to try the right of a judgment creditor of T. to the money in court.

THIS was a writ of error to the District Court for the city and county of *Philadelphia*, in which bills of exceptions to the

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opinion of the court on points of evidence, and to the charge of the court, were returned with the record. The case was a feigned issue, directed by that court to try the right of Thomas Bradford to certain moneys arising from a sheriff's sale of real estate, by virtue of a *levari facias*.

Thomas Bradford, the defendant in error, was plaintiff below, and Robert Stiles, Timothy Caldwell, Isaac Harbert, Sarah Stephens, Joseph Shoemaker, and the Bank of North America, the plaintiffs in error, were defendants below. The facts were these:—

Thomas T. Stiles, being indebted to Thomas Bradford on certain promissory notes, suits were brought and judgments obtained upon them in the year 1819. Stiles soon after began to purchase real estate in the city and county of Philadelphia, and with a view to screen it from the judgments of Bradford, had [*395] some portions of the *property conveyed to his brother Robert Stiles, (who was himself without the means of purchasing property,) and other portions of it to his son-in-law, Joseph Shoemaker. The property out of which the moneys in court were raised, was situate in Quince street, and was purchased by Thomas T. Stiles, and paid for with his money, but the conveyance was made to Robert Stiles. Having occasion for money in the year 1822, Thomas T. Stiles borrowed sixteen hundred dollars from the American Fire Insurance Company, and gave them as security a mortgage on the Quince street property, together with a bond and warrant of attorney, all executed by Robert Stiles; that company being fully apprised, through their president and solicitor, of the circumstances attending the ownership and tenure of the property, and of the reasons for its being held as it was. By lapse of time the original lien of Bradford's judgments expired, but on the 3d of April, 1829, two of them, amounting together to the sum of sixteen hundred and ninety-eight dollars and seventy-five cents, were revived. On the 16th of April, 1829, Thomas T. Stiles, who was then indebted to Isaac Harbert on two notes, amounting to fifteen hundred dollars, obtained from him and Timothy Caldwell, their indorsement, for his accommodation, of a note for four thousand dollars, (for which he received the money,) and on the same day, to indemnify them against any loss on this note, gave them a mortgage executed by Robert Stiles, on certain property on Twelfth street, which belonged to Thomas T. Stiles, but was held in the name of Robert, together with Robert's bond and warrant of attorney, originally restricting the judgment to be entered upon it to the Twelfth street property. By virtue of this power of attorney, judgment was entered on the 17th of April, 1829. On the 12th of July, 1829, Robert Stiles, by agreement filed

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and entered on the record, agreed to remove the restriction on the judgment of Caldwell and Harbert, and give it the effect of a general judgment; and Thomas T. Stiles, a few days after, was made acquainted with this agreement and approved of it. With the moneys obtained from the note for four thousand dollars, Thomas T. Stiles paid Harbert the amount of the first note for fifteen hundred, and employed the rest in improving his real estate, with the exception of the Quince street property. These transactions with Thomas T. Stiles, were principally conducted by Harbert, on behalf of himself and Caldwell, with a full knowledge on the part of Harbert of the manner in which the property was owned and held, and that the reason of its being so held, was to cover it from the judgments of Bradford; but of these circumstances Caldwell was ignorant. In June, 1829, Thomas T. Stiles became insolvent, and Harbert and Caldwell took up the note for four thousand dollars.

On the 19th of September, 1829, Caldwell and Harbert, by virtue of executions on their judgments, sold the Twelfth street property, and a leasehold interest (originally for ninety-nine years) in the Gloucester ferry, as the property of Robert Stiles. At this sale, Bradford gave notice, that the Gloucester ferry was owned by *Thomas T. Stiles, and not Robert Stiles, and that it was bound by his judgments. The [*396] Twelfth street property was sold *for six thousand seven hundred dollars, and the sale was afterwards set aside by the court. The Gloucester ferry property sold for nine hundred dollars, and the net proceeds, eight hundred and seventy-nine dollars, were paid to Harbert and Caldwell, without opposition.

On the 30th of November, 1829, the American Fire Insurance Company, by virtue of executions on their judgment, sold the premises in question as the property of Robert Stiles, for three thousand two hundred and twenty-five dollars. They received without opposition the amount of their debt, interest and cost, and the balance was paid into court to await its decision.

On the 7th of December, 1829, Caldwell and Harbert sold the Twelfth street property, for eight thousand four hundred dollars. The proceeds were applied, as far as necessary, to the payment of prior liens, and the balance, viz. : one thousand six hundred and forty dollars, was paid to Caldwell and Harbert.

The fund paid into court, amounting to fifteen hundred and fifty-one dollars eighty-seven cents, arising from the sale of the Quince street property, was claimed by Bradford, by virtue of his judgments of the third of April, 1829, against Thomas T. Stiles, and by Timothy Caldwell and Isaac Harbert, who were the only parties to the feigned issue who appear to have set up

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an adverse claim on the trial. Mrs. Stephens, the mother-in-law of Robert Stiles, it was stated, had a judgment against him, but its date did not appear, as she declined taking part in the trial of the issue.

An agreement for a feigned issue was drawn up and signed by the parties, which, among other things, provided "that the costs shall follow the verdict, and under the aforesaid issue, the defendants shall be entitled to the benefit of any question that may arise in relation to the lien of a judgment of revival, or under the original judgment."

On the trial of the cause in the District Court, the defendants, Harbert and Caldwell, offered in evidence a deposition of Thomas T. Stiles, taken by the plaintiff and read by him on the argument of his rule to show cause why the present issue should not be directed to determine his right to the money in court. The plaintiff objected to the reading of the deposition, because Thomas T. Stiles was then in court, and could be called by the defendants as a witness. The court rejected the evidence, and the defendants, Caldwell and Harbert, tendered a bill of exceptions to their opinion.

The defendants, Harbert and Caldwell, proposed, under the agreement for a feigned issue, to inquire what was the consideration of the notes on which the judgments of Bradford were founded. The court overruled this offer also, and sealed another bill of exceptions, which was tendered to their opinion.

When the evidence was closed and the arguments of counsel concluded, the President of the District Court before whom the [397] cause was tried, delivered a charge to the jury, in the course of which, he said, that "the question was, whether the money in court should be appropriated to pay the judgment creditors of Thomas T. Stiles, or to pay the judgment creditors of Robert Stiles. It was abundantly proved by the evidence, and, he understood, conceded by the defendants' counsel, that the property, by the sale of which the money was made, actually belonged to Thomas T. Stiles. The deed was in the name of Robert Stiles, but it was manifest, beyond all question, that the beneficial interest belonged exclusively to Thomas T. Stiles.

"If the fact was so, the equitable interest of Thomas T. Stiles in the property, was bound by the lien of Bradford's judgments against him.

"The sale which produced the money in question, was made on a judgment and execution against Robert Stiles, and generally speaking, a sale under execution passes no other, or greater interest in the property than the defendant had, and, therefore, the proceeds of such sale shall go to the discharge of

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liens existing as against his property. This being the general rule of law, the defendants contend, that as the property was mortgaged by Robert Stiles, and sold on a judgment and execution against him, the proceeds in question being derived from a sale of Robert Stiles' actual or supposed interest in the property, were to be appropriated in payment of the judgment against him.

"In answer, it is to be observed, that the mortgage upon which this sale was made, was executed to the American Fire Insurance Company at the instance of Thomas T. Stiles, and for his benefit; and that the officers of that company had a perfect knowledge of all the circumstances. They not only knew that the property was held by Robert Stiles in trust for Thomas T. Stiles, but they knew also the reason why it was so held, viz., to protect it from the lien of Bradford's judgment.

"If such are the facts, the mortgage executed by Robert Stiles under these circumstances, bound Thomas T. Stiles' interest in the property as effectually as if Thomas T. Stiles had executed the mortgage in his own name. It was in equity a mortgage by him using the name of Robert Stiles, his trustee, for the purpose of giving it a legal form. The lien of Bradford's judgment was not displaced by the mortgage, and he has lost his priority only because the lien expired by lapse of time, not having been continued according to the provisions of the act of assembly. On revival of the judgment, the lien became subject to the priority of the mortgage. Thomas T. Stiles, being, therefore, virtually, and to every equitable and just purpose the mortgagor of the property, he was in the suit upon it, the real, and Robert Stiles only the nominal defendant. His interest, and the whole of his interest, was sold under the *levari facias*. But the law of distribution would be the same, in case Robert Stiles had executed a valid mortgage in fraud of such trust. In such case, equity would displace the interest of Thomas T. Stiles only so far as was *necessary to give [*398] effect to the mortgage, and the surplus would belong to him or to his creditors. The act of assembly referred to, would, in the case supposed, control the equity of the mortgage altogether, or permit equity in righting one party, to do justice to all. It is, however, an act declaratory of the existing laws, and not introductory of any new rule."

The following points were propounded to the judge, who gave to them the answers annexed:

First point. "That the interest of Robert Stiles was alone sold under the execution, and nothing more."

Answer. "The interest of both Robert Stiles and Thomas T. Stiles was sold under the execution."

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Second point. "That the judgment creditors of Thomas T. Stiles have no claim upon the fund in court."

Answer. "The judgment creditors of Thomas T. Stiles are entitled to the fund in court."

Third point. "That at the sale on the thirtieth of November, 1829, it was competent for the plaintiff to give notice of his claim on it, as the property of Thomas T. Stiles, and that if he did not, it is his own laches, and the want of notice cannot be used to the disadvantage of the defendants, Caldwell and Harbert."

Answer. "The plaintiff was not required by law to give notice of his claim at the time of sale, on the thirtieth of November, 1829, nor are his rights at all affected by not having done it."

Fourth point. "That the plaintiff made his election on the thirtieth of September, 1829, to look to the interest of Thomas T. Stiles, and not to the interest of Robert Stiles, in the property held by Robert Stiles in trust for or by the fraud of the parties."

Answer. "There is no evidence in the cause showing that the plaintiff made his election on the thirtieth of September, 1829, or at any other time, to look to the other property of Thomas T. Stiles, for payment, and to allow the fund in court to go to the creditors of Robert Stiles."

Fifth point. "That Robert Stiles had a good title as against Thomas T. Stiles, and that equity would not decree a reconveyance of the property for the benefit of the creditors of Thomas T. Stiles, to the injury of the creditors of Robert Stiles, until the accounts are settled and balance paid."

Answer. "The fund in court is liable for charges incurred by reason of the trust; but there is no evidence of the existence of such charges."

The judge concluded his charge by observing, "If my view of the evidence is right, and the witnesses have spoken the truth in the matter, the plaintiff is entitled to the verdict of the jury."

The counsel of the defendants Harbert and Caldwell, excepted to the charge of the court, and in this court filed the following specifications of error:

[*399] *1st. Because the court erred in directing an issue in the case to determine the right of the plaintiff below to the fund in court.

2d. Because the court below refused to permit the defendant below to read the deposition of Thomas T. Stiles, taken by the plaintiff in this case.

3d. Because the court below refused to permit the defendants to ask of Thomas T. Stiles the following question: "What

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was the consideration of the notes for which the judgments were obtained by the plaintiff against Thomas T. Stiles?"

4th. Because the court refused to permit the defendants below to show that the consideration had failed, for which the judgment below was given.

5th. Because the court erred in charging the jury.

1. That more than the interest of Robert Stiles was sold under the execution.
2. That the judgment creditors of Thomas T. Stiles have a claim on the fund in court.
3. That the plaintiff below had the right to the proceeds of the execution, before any of the other claimants, including the plaintiffs in error.
4. That the plaintiff below, under any view of the case, had a right to recover and receive the fund in court.
5. That the notice to Isaac Harbert, one of the defendants, was notice to the other defendant, Timothy Caldwell.
6. That the election of the plaintiff on the 30th of September, 1829, to look to the interest of Thomas T. Stiles, did not bind him, nor impair his right to recover.

Additional specification :

Because the court took from the jury the consideration of the question whether Robert Stiles had any lien on the property, for any advances made by him to Thomas T. Stiles on account of the property.

Errors were also assigned in this court on the part of Mrs. Stephens and Robert Stiles, who took no part in the trial of the feigned issue. They were as follows :

1. The court erred in directing an issue to try the claim of Thomas Bradford, Sr., to the fund in court, because the property mentioned in the feigned issue, and from which the fund therein mentioned was raised, was levied upon and sold as the property of Robert Stiles alone, no title having passed to the purchaser except that of the said Robert Stiles, and no one having any claim to the fund except the lien creditors of the said Robert Stiles, as is expressly provided for by the act of assembly.

2. The court erred in permitting the issue to be tried by the jury, because Thomas Bradford, Sr., according to the terms of the feigned issue, was a judgment creditor of Thomas T. Stiles, and not of Robert Stiles : and if the property sold was in fact the property of Thomas T. Stiles, and not of Robert Stiles, a sale by the sheriff of said property *as the property of Robert Stiles could not disturb the interest of Thomas T. Stiles in said property, or diminish the force and legal effect

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of the lien thereon of the judgment of the said Thomas Bradford, Sr.

The court erred in giving judgment for Thomas Bradford, Sr., under the feigned issue aforesaid, because the whole proceedings at the instance of the said Bradford, was irregular, erroneous, and illegal, and therefore furnished no lawful ground upon which the said judgment could be entered.

F. E. Brewster for Sarah Stephens and Robert Stiles, cited act of 1705, sec. 6, 7, *Purd. Dig.* 289; *Freedly v. Sheetz*, 9 *Serg. & Rawle*, 156; *Auwerter v. Mathiot*, 9 *Serg. & Rawle*, 397; *Weidler v. The Farmers' Bank of Lancaster*, 11 *Serg. & Rawle*, 134.

J. Randall for Caldwell and Harbert, cited *Maclay v. Work*, 10 *Serg. & Rawle*, 194; Act of 1700, sec. 1, *Purd. Dig.* 288; *Smith v. Painter*, 5 *Serg. & Rawle*, 223; *Harrison v. Waln*, 9 *Serg. & Rawle*, 318; *Walters v. Pratt*, 2 *Rawle*, 265.

The court declined hearing *V. L. Bradford* and *Bradford* for the defendant in error.

The opinion of the court was delivered by

SERGEANT, J.—[Who after stating the principal facts of the case, proceeded as follows.]—1. On the trial of this cause in the court below, the defendants Harbert and Caldwell offered in evidence a deposition of Thomas T. Stiles, which had been taken on behalf of the plaintiff, and read by him on the argument of the rule to show cause why the feigned issue should not be directed, to try the plaintiff's right to the money. But it was rejected, because Thomas T. Stiles was then in court, and could be called by the defendants as a witness. It is now contended, that the defendants had a right to use the deposition, inasmuch as it had been produced and read by the plaintiff on the hearing of the rule; and the case of *Maclay v. Work*, 10 *Serg. & Rawle*, 194, is relied on, where it was held, that if a party has produced a letter in evidence at a former trial, it is competent evidence for the other party at a subsequent trial, the previous production of it being considered as an admission of its competency. This deposition seems to have been taken under one of the rules of the District Court, which requires, that on all motions or rules to show cause, on the hearing of which facts are to be investigated, the testimony shall be taken by deposition; and no witnesses are to be examined at the bar, but by special and previous order of the court; so that the taking of the testimony by deposition, in this case, was not altogether a voluntary act of the plaintiff, but required by the rule of court, for the more easy

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and expeditious dispatch of business. In this it differs from the case cited, where the production of the letter was entirely a voluntary act of the party. But there is a still greater difference. Evidence by deposition, on a trial at common law, is *of a secondary character, and is therefore encountered [*401] by a rule of law which forbids such evidence, when better evidence exists, and is in the power of the party. The oral testimony of the witness in the presence of the court and jury, was much better evidence than his deposition could be; and as it was in the power of the defendants, they were bound to resort to it. They could not substitute a kind of proof inferior in its nature. It is not easy to perceive a better reason for allowing a deposition under such circumstances, than there would be to permit a party, when a witness was present, instead of calling him, to produce evidence of what that witness swore on a former trial when called by the opposite party, which would scarcely be attempted. Perhaps the reading of the deposition might be deemed an admission of the competency of the witness, so far as respected existing objections on the side of the party reading it, but it cannot be deemed such an admission of the contents of the deposition as to supersede the usual and salutary rule, that the best evidence in the power of the party must be given. There appears therefore no error on this point.

2. The defendants, Harbert and Caldwell, proposed to inquire of a witness, what was the consideration of the notes and judgments of the plaintiff, but the court overruled the evidence. The issue directed by the court was, to try the right of T. Bradford to have and receive, according to the amount of his liens, the moneys in court,—and it is added, that the defendants under the aforesaid issue, are to be entitled to the benefit of any question that may arise in relation to the lien of a judgment of revival, or under the original judgment. The argument of the defendants now is, that under this agreement they had a right to inquire into the validity of the judgments of T. Bradford, and to travel into the original cause of action on which they were founded. If that was the intention of the defendants, it is by no means expressed in such language as to warrant the construction contended for. The words of the agreement would seem only to justify an inquiry into the lien of the judgments, and not into the validity of the judgments by which the lien was created. The object of the parties appears to have been, merely to try the right to the moneys in court under the judgments. On general principles, a judgment is binding and conclusive until reversed or set aside by a legal proceeding. It cannot be collaterally questioned by third persons, except on the ground of fraud and collusion in the procuring or entering it, which was

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not alleged here. If the court below had so far a control over a judgment in their own court, as to have permitted subsequent judgment creditors to inquire into the original cause of action on which it was obtained, that permission should clearly appear to have been granted; otherwise the plaintiff would be taken by surprise. But it is very questionable whether the court below could or would have authorized such an inquiry, where the judgments were obtained years before, in an adverse proceeding, and [*402] afterwards duly revived. *On the issue, however, the court below was right in refusing to admit the evidence.

3. But the main question in the cause was that contained in the exception to the charge of the court, and their answers to certain points proposed by the counsel for the defendants, Harbert and Caldwell, which may be summed up thus:—that the property having been sold under a mortgage to the American Fire Insurance Company given by Robert Stiles, the moneys arising therefrom could only be applied to pay judgment creditors. The court below charged the jury, that if the property, though held in the name of Robert, really belonged to Thomas, and the mortgage was made by Robert at his instance, and for his benefit, and it was so understood by all the parties, Thomas was the real mortgagor, and a judgment creditor of Thomas was entitled to the surplus proceeds in preference to a subsequent judgment creditor of Robert, who, at the time of his judgment, was acquainted with all the circumstances of the ownership of the property, and of its being held for the purpose of evading the prior judgment.

It is well settled in this state, that a judgment is a lien on the equitable estate of the debtor; and for want of a court of chancery, this equity is enforced by our courts wherever it can be accomplished in the ordinary modes of administering justice. Thomas T. Stiles, being in equity the sole owner, and the real mortgagor of the property, a judgment against him was a lien upon it as between the parties, and third persons lending their money, and taking a judgment against Robert, with full notice of this equitable interest, must be considered as affected by it as fully as Robert himself was, and cannot be permitted to allege either the land or its proceeds to be the property of Robert, against their own knowledge, and to the prejudice of a prior judgment creditor of Thomas. It is insisted, that the only remedy of such judgment creditor is, to give notice at the sheriff's sale of his claim, and to enforce it by another execution against the land. But under our system of sales of land by execution, he who has a prior lien on the land, (with the exception of mortgagees, who are within the provisions of the late act of assembly,) has a right to resort for the payment of his debts,

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to the fund raised by the sheriff's sale, and brought into court. The money stands in the place of the land. In the case of the Commonwealth for the use of Gurney's Executors v. Alexander *et al.*, 14 Serg. & Rawle, 257, money came into the hands of the sheriff, under a sale of land belonging to Maxwell, on a judgment against Maxwell, but the land had been purchased by Maxwell from Patton, and while Patton owned it, Gurney had obtained a judgment against Patton, which continued a lien at the time of the sheriff's sale: and it was held, that the sheriff was bound to pay Gurney's judgment out of the moneys in his hands, and he and his sureties were made responsible for not having done so. In that case, the same argument was used that is urged here—that nothing but the rights of Maxwell *could be sold, [*403] and therefore no part of the proceeds of the sale could be applied to any other purpose than the discharge of judgments against Maxwell, and the surplus, if any, to be paid to Maxwell himself. But, says Tilghman, C. J., delivering the opinion of the court, "What was the right of Maxwell? He had a right to the fee simple, subject to all liens by virtue of judgments, either against himself or those under whom he claimed." The right of Robert Stiles in the present case was no better. In fact, it would appear by the evidence, that he neither had nor pretended to have any right whatever in the property; he was a mere instrument to effect the purposes of Thomas T. Stiles, to whom the property belonged, who directed its various modifications, and whose character was known to all the parties dealing with them. It would be unjust, if, under colour of being creditors of Robert, who had no claim whatever, to the property, subsequent judgment creditors were to be preferred to prior judgment creditors of Thomas, who was its sole owner. That could only take place when such creditors lent their money to Robert without notice; they would, in that case, stand in a different situation, and might claim in equity to hold discharged of a latent trust.

6. Another error assigned in the charge of the court is, on stating to the jury, that the election of the plaintiff, on the thirtieth of September, 1829, to look to the interest of Thomas T. Stiles, did not bind him or impair his right to recover. It appears that at that time the sale took place under the execution issued by Harbert and Caldwell, on their judgment against Robert Stiles, of the leasehold property at Gloucester ferry, and T. Bradford gave notice at the sale that his judgment was a lien on it as the property of Thomas T. Stiles. It does not appear that any further steps were taken after this notice. Correctly speaking, the judgment was not a lien on a leasehold interest, and if pursued would have been ineffectual. For aught

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we know, this may have been the reason why the claim was abandoned. At any rate, a mere notice of this kind, vesting no right, and incapable of yielding any satisfaction, cannot be considered as an election to resort to that source for payment, and to waive the right to a fund on which the plaintiff has a good claim, and which is available in payment of his debt. The notice, therefore, would seem to be of no importance on this issue, and its bearing was rightly stated by the court below.

Errors were also assigned by Mrs. Stephens, a judgment creditor of Robert Stiles, who declined taking part in the issue below, that the court had no right to direct a feigned issue: and the same objection has been made on behalf of Harbert and Caldwell. The ground on which this is placed is, that the money being raised by the sale of the estate of Robert Stiles, the court had no right to direct an issue at the instance of the creditors of Thomas T. Stiles. On the principles, however, mentioned before, this is an incorrect mode of stating the case. The creditors of [404] Thomas T. Stiles had a claim on the fund, *and the powers of the court, under the act of assembly of April, 1827, were ample to extend to them relief in the shape of a feigned issue to settle doubtful points. We are of opinion that the judgment be affirmed.

Judgment affirmed.

Cited by Counsel, 7 S. 333; 17 S. 439, 456.

[PHILADELPHIA, FEBRUARY 21, 1834.]

Rhoads against Gaul et al.

IN ERROR.

A book, purporting to be a book of original entries, containing entries of the sale of goods, made when the goods were ordered, but before they were delivered, is not competent evidence of goods sold and delivered. Nor are arbitrary signs or marks affixed to the entry of each article, not for the purpose of charging the defendant, but of informing the porter so as to prevent a second delivery of a similar article, are not evidence of delivery, particularly when it appears that the signs or marks were not always made by the person who made the charge, nor by the plaintiff, or a clerk in his employment.

ON a writ of error to the District Court for the city and county of *Philadelphia*, it appeared that this suit was brought by the defendants in error, Martin and William Gaul, surviving partners of the firm of Frederick Gaul & Sons, against the plaintiff in error, Daniel J. Rhoads, for goods sold and deliv-

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ered, to which the defendant below pleaded *non assumpsit* and payment.

From the bill of exceptions returned with the record it appeared, that on the trial the plaintiffs, preparatory to offering in evidence their book of original entries, called a witness who swore that the book produced was the book of original entries of the plaintiffs': That certain entries in it charging the defendant, were in the handwriting of a person who had formerly been in the employment of the plaintiffs, but was not then within the jurisdiction of the court, and that the entries were made when the goods were ordered.

One of the plaintiffs was then sworn, who testified that the book produced was their book of original entries: That the entries were made before the delivery of the goods: That the plaintiffs had a sign by which the delivery was marked: That the person who made the entries generally, but not always, made the sign: That it was made by the person who happened to be in the counting-house: That the entries were always made at the time of the sale, and if the goods had not been delivered, the entries would have been erased: That the sign was a tick made thus, V: That the tick was merely for the direction of the porter, to prevent a second delivery of the article sold: That the tick was generally made by the person who saw the goods sent by the porter, and that he could not say by the appearance of the ticks, by what hand they were made. The witness then proved *the entries in his own handwriting. Upon the [*405] preliminary evidence thus given the plaintiffs offered the book in evidence, which was objected to by the defendant's counsel, but the court overruled the objection, and sealed a bill of exceptions.

After having proved by the oath of the other plaintiff, the entries made by him, and by another witness the value of certain articles delivered to the defendant, and given in evidence two letters from the defendant to F. Gaul & Sons, one of them dated Pottsville, May 21st, 1829, and the other, August 5th, 1829, the plaintiffs called a witness, who swore, that he was well acquainted with the manner in which business was conducted in the plaintiffs' counting-house, and with the manner in which the entries were made in the book which had been given in evidence: That when a dot preceded the figures in either of the columns in the left hand side of the page, and two dots succeeded it, the sale was of so many barrels of porter or ale as the figures indicated, and when three dots followed the figures, they denoted the sale of so many hogsheads of porter or ale. When this evidence was offered, the defendant's counsel objected to it, but the court having permitted it to be given, a second bill of

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exceptions to their opinion was tendered by the defendant's counsel, and sealed by the court.

The book above referred to was exhibited to the Supreme Court, in which it appeared that the entries were made thus:

.3..	.3..	Daniel J. Rhoads, V	36
.3..	.3..	Daniel J. Rhoads, V 20 Groce corks 2 B C	36
2..	2..	Daniel J. Rhoads, V	48

The jury found a verdict for the plaintiffs, on which judgment was entered, and the defendant took out a writ of error.

The errors assigned in this court were,—

1. That the entries were made at the time the orders were received, and not at the time of the sale and delivery of the articles said to have been sold.

2. That the supposed sign of the delivery was not proved by any person.

3. That there are no charges in the book against the defendant below, of the sale and delivery of goods to him, but marks only, which are not intelligible to persons acquainted with business.

Bowyer, for the plaintiff in error.—By the common law, books are not evidence unless proved by the oath of some other person than the party who offers them. Their admission, supported by the suppletory oath of the party, arose from a supposed necessity, and it has been “lamented that it is necessary in this country to resort to evidence of this kind, as it opens a door and furnishes a temptation to much mischief. When a book is offered in evidence, it ought to appear suited to aid the [406] oath of the party by whom it is produced, *and to fortify and confirm it.” Per Sedgwick, J., 2 Mass. R. 217. The principal evidence is the oath of the party, and the book a mere auxiliary in corroboration of it. 12 Johns. R. 464. If, as has been said, the courts of Pennsylvania have adopted the civil law, it would have been well, in order to prevent abuses, to have adopted its provisions on the subject, and required the books of merchants and others to be properly kept, and verified by a proper officer at least once a year. To entitle a book to be read in evidence to prove the sale of goods, it must be proved that it is a book of original entries, and that the charges were made at or near the time of the sale and delivery of the articles sold. In support of this position he cited—*Poultney v. Ross*, 1 Dall. 239; *Tenbroke v. Johnson*, 1 Cox R. 288; *Wilmer v. Israel*, 1 Browne’s R. 257; *Sterrett v. Bull*, 1 Binn. 234; *Curren v. Crawford*, 4 Serg. & Rawle, 3; *Rogers v. Old*, 5 Serg.

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& Rawle, 404; Summers v. M'Kim, 12 Serg. & Rawle, 411; Cooper v. Morrel, 4 Yeates, 341; Smith v. Lane, 12 Serg. & Rawle, 80; Juniata Bank v. Brown, 5 Serg. & Rawle, 226; 1 South, 370; Thompson v. M'Kelvey, 13 Serg. & Rawle, 126; Baisch v. Hoff, 1 Yeates, 198; Vance v. Feariss, 1 Yeates, 321; Wright v. Sharp, 1 Brown's R. 344. The book in question was a mere order book. If the plaintiffs found they could not supply the whole order, they furnished what they could, and charged it in the day book, and the charges in this book became of no consequence. Entries in a regular book of original entries, are undoubtedly *prima facie* evidence of delivery, but here it appears a certain sign was made, which it is alleged was the evidence of delivery. It was necessary, at least, to prove who made that sign, of which there was no evidence. Again, there was no charge of goods in the book, nor does it appear from the book whether the items it contains were intended for debits or credits. As the books of a party are admitted from necessity, it was his duty to do all in his power to make them intelligible, and if the plaintiffs chose to make a book of riddles, they cannot be allowed to explain it to their own advantage. There are several columns on the left side of the page, and figures with one or more dots next to each are made in these columns. There is no explanation in the book itself, from which it can be known, whether porter, beer, or ale is intended to be charged, nor indeed any other article of merchandise. Another objection to such a mode of keeping a book is, that it is open to fraud and liable to mistakes. One dot more or less, according to the evidence, changes the quantity of goods said to have been sold, and it is easy to add or subtract these dots intentionally, or to make mistakes in entering them, and in either case injustice is done. Besides, not being understood by persons in the trade, it is impossible to check errors. It is not like keeping a book in a foreign language, which is understood by those acquainted with the language, or like the books of some merchants, which can be explained by men in the same business. The plaintiffs having chosen to make a mystery of their books, the inconveniences of them should not be visited on others.

* *Grimshaw*, for the defendants in error, contended that this book is such as the law recognises. In mercantile [*407] transactions strict evidence is not required. *Riche v. Broadfield*, 1 Dall. 17. But even if it were required, and this book should not be held to be good evidence, still the court will not reverse a judgment rendered after a fair hearing, where the jury were perfectly satisfied, if there was other testimony which would authorize their verdict. Here are two letters by which the plaintiff in error

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orders these goods. This book was sufficient, because the entries were made at the time of the sale, and the entry is evidence of sale and delivery, independent of the sign or tick, which was merely surplusage, or made to prevent a second delivery; and it need not be proved who made it. As to the manner of making the charges, it is clearly understood as the charges made by an apothecary, which are generally in Latin, and by signs of ounces and drachms; or by grocers, whose charges are abbreviated; and so are those of a dry goods merchant, and indeed the charges of most persons in trade. Tallies and other symbols are used and are good evidence. 1 Phil. Ev. 490; 6 Ves. Jr. 397; 5 Co. 68; *Ingraham v. Bockius*, 9 Serg. & Rawle, 285; *Arnold v. Anderson*, 2 Yeates, 93.

The opinion of the court was delivered by

GIBSON, C. J.—A shop-book is competent as a registry of the sales made in the course of the business; and, in the nature of things, no true registry can be made of a fact that has not happened. If it were registered as having already happened, under a confident expectation that it would happen, the registry was false when it was made, and being false then, it is false still. The entries, therefore, ought to be made at the delivery of the goods, or immediately afterwards; and this is what is meant in *Curren v. Crawford*, 4 Serg. & Rawle, 3, by saying they ought to be made at or near the time. It is an undisputed part of the present case, that the charges were made when the goods were ordered and before they were sent, so that the entries are clearly incompetent standing by themselves; and what supplemental or independent fact is there to prove the delivery, which is as indispensable to charge the customer as the sale itself? It is that an arbitrary mark or sign was separately affixed to the entry of each article; not, however, to charge the defendant, but to inform the porter so as to prevent a second delivery. According to *Rogers v. Old*, 5 Serg. & Rawle, 404, in which an entry not purporting on its face to charge the party was held to be inadmissible, the purpose of the marks is conclusive of their incompetency; for it must be indifferent whether there be no apparent intent to charge at all, or an apparent intent rebutted by the evidence adduced to explain and support it. Independent of this, it is decisive that the marks were not always made by the hand that made the charge: and that no witness proves them [*408] to have been made in this instance, by the plaintiff *or a clerk in his employment. If, then we treat the marks as the substantive evidence of delivery, dismissing all beside, except so far as it serves to explain the meaning of the marks, we look in vain for proof of their authenticity. In questions

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of this sort, it is necessary to show, not only the originality of the book, but the genuineness of the writing, in order to raise a presumption that the transaction was in the usual course of the business. Such is the principle of *Sterrett v. Bull*, 1 Binn. 234, by which it was determined that entries in the handwriting of a clerk must be verified by his oath, or proof be made that he is dead or out of the jurisdiction. What we have here as evidence of delivery is a set of arbitrary signs, intelligible but to those who are in the service of the plaintiff, and unsupported by the oath of him who made them; consequently they ought not to have gone to the jury.

Judgment reversed, and a *venire de novo* awarded.

Cited by Counsel, 4 Wh. 37; 5 W. & S. 473; 2 Barr, 241, 464; 9 H. 439; 3 C. 33; 6 C. 309; 2 Wr. 374; 3 Wr. 410; 2 G. 380; 3 G. 284.

Cited by the Court, 5 Wh. 324; 7 W. 42; 8 Barr, 477; 8 C. 16; 1 Wr. 142; 13 Wr. 371.

[PHILADELPHIA, FEBRUARY 21, 1834.]

Patton *against* Ryan.

IN ERROR.

Where a plaintiff makes an entry of goods sold upon a card, with pen and ink, and the same evening or the next day transcribes the entries into a book, the book is to be considered as the book of original entries of the plaintiff, and may be read in evidence to the jury, and the material on which the entry was first written, or its size and shape, are indifferent.

THIS was a writ of error to the Court of Common Pleas of *Philadelphia* county.

From the record it appeared, that Mary Ann Ryan, the plaintiff below, instituted this suit against William Patton, the defendant below, to recover the sum of fifty-four dollars, for goods sold and delivered. The cause was tried in the Common Pleas of Philadelphia county on the twenty-fifth of September, 1833, and a verdict rendered in favour of the plaintiff. On the trial the plaintiff produced a book in her handwriting, purporting to be a book of original entries, and upon being sworn to make true answers, testified as follows: "I made the entries against Mr. Patton first upon a card, the size of a spelling-book. I afterwards copied them into this book, either the same evening, or next day, or as soon after as I conveniently could. After I copied the entries, I destroyed the card." The book was then offered in evidence, to which the counsel for the defendant ob-

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jected, but the court overruled the objection, and permitted the [*409] *entries in the book to be read in evidence to the jury. A bill of exceptions was then sealed by the judge, and the error assigned was—

1. That the court below erred in permitting said book to be given in evidence to the jury, it not being a book of original entries.

J. W. Ashmead, for the plaintiff in error.—The only exception taken to the proceedings below is, that the court erred in permitting the book of the plaintiff, under the circumstances, to go to the jury, as the book of original entries of the plaintiff. The card upon which the entries were first written, could only be viewed as the original entries of the plaintiff, and the book read to the jury was neither more nor less than a transcript from the card. The entry was, however, made with pen and ink, and is, on that account, a much stronger case, than where it was first made with a pencil, either upon a slate or a fugitive piece of paper; because, in the latter instance, the very circumstance of a party making his first entry with a lead pencil, or upon a slate, shows of itself an intention not to trust to it as the evidence of the transaction. It is clearly otherwise in the case of an entry made with ink, inasmuch as such a memorandum is not easily liable to be effaced, and is just as permanent in its character, as the entry transcribed into the book. But three cases are to be found in the Pennsylvania reports, applicable to the question before the court. The first is *Ogden v. Miller's Executors*, 1 *Browne's Rep.* 147, in which Judge Rush determined, that entries copied from a slate were not the original entries of a party, and could not be read to the jury. This determination has been nowhere expressly overruled. It is true, that what is said by Judge Rodgers, in the case of *Kessler v. M'Conachy*, 1 *Rawle*, 441, implies a doubt whether entries copied from a slate might not be sufficient; but it by no means determines that the law is so. His language is, "that if M'Conachy had made the entries (on a slate), and had afterwards copied them in the book, it might have been deemed sufficient." The learned judge, who delivered the opinion of the court, is exceedingly guarded in his language, and avoids saying that such would be the result; but with great caution observes, that it might be "deemed sufficient." The case of *Ingraham v. Bockius*, 9 *Serg. & Rawle*, 285, is the only remaining case applicable to the point, and it differs materially from the one now before the court; for in that case the plaintiff made but one entry, and that in the book, while in this, the entry was first made upon a card, and subsequently transcribed into the

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book. The circumstance of the servant of the plaintiff making a memorandum of the quantity of meat furnished each customer, in order that he might inform his employer on his return, is of no importance, inasmuch as it was not an entry made by the plaintiff. Besides, it is worthy of remark, that Chief Justice Gibson, in delivering the opinion of the court in *Ingraham v. Bockius*, lays great stress on the fact, that the plaintiff never directed the entry to be made by his servant. It is, besides, important to notice, what cannot have escaped attention, [*410] that this court has declared, over and over again, that the principles applicable to the admission of books of original entries, ought not to be extended. To sustain then the views of the court below, the doctrine on this subject must be extended further than it has ever yet gone, and to an extent so great as to endanger the security of the community; for, upon principle, no man ought to be permitted to make an entry upon a card with pen and ink, and then deliberately destroy it, and seek to give the mere copy or transcript of the entry in evidence, as a book of original entries, with the view of subjecting his neighbour to a liability.

Hazlehurst and *D. P. Brown*, for the defendant in error.—The question which arises is exclusively one of evidence, and may be readily determined. It is, in fact, whether the book received in evidence by the court below, was or was not the book of original entries of the plaintiff in the cause. Whether the entry was an original one is entirely a question of intention, and dependent upon the particular circumstances of the case. The very fact that the plaintiff below made her first entry upon a card, and copied it into her book the same evening or the next day, shows of itself an intention not to consider it as the regular and proper entry. The plaintiff could, unquestionably, make her first entry in the book, without having placed it upon the card at all, and her book would then be undoubted evidence. If this be so, why should the circumstance of a party making, at the time of an occurrence, a memorandum to prevent mistake in the entry, operate against it, if properly made? Be the principle what it may, authority is express and decided on the point. The case of *Ingraham v. Bockius*, 9 Serg. & Rawle, 285, is decisive of the case, and settles the question against the views of the plaintiff in error. In addition, the plaintiff below has herself testified to the correctness of the book received in evidence, and her oath ought to have considerable influence on the mind of the court.

PER CURIAM.—The principle of *Ingraham v. Bockius* is, that

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a minute intended, not to be itself the evidence of the sale, but to be used in the preparation of such evidence, is not an original entry within the meaning of the term as it is used in the books. If such be its effect, the material on which it is written, or the size and shape of it, must be indifferent. Here it was made on a card which was suspended by a book into which it was transcribed, and which was destined to be the final means of perpetuating it; for the destruction of the card when the transcript was made, shows that its office was but a temporary one. It would be most unreasonable to preclude a shopkeeper from making the regular, permanent entry in his day-book, because he had taken the precaution to put down the transaction on a fugitive scrap of paper, in order to insure a greater degree [411] of accuracy when the regular entry of it should come to be made. Such a rule would be subversive of everything like fair dealing; and under the circumstances of the present case, it is clear that the book was properly received.

Judgment affirmed.

Cited by Counsel, 4 W. 259; 10 W. 249; 6 W. & S. 351; 11 H. 159.

Cited by the Court, 6 Wh. 190; 2 W. 458; 5 W. 432.

[PHILADELPHIA, FEBRUARY 21, 1834.]

Gratz *against* Gratz.

IN ERROR.

If the plaintiff and defendant in an action of partition, have, by agreement, made partition between them, by which certain parts of the property are united to form one division, and certain other parts to form the other division, the opinion of witnesses is not admissible in evidence to show that a more equal and convenient partition might have been made by a different arrangement of the parts.

It is no reason for reversing a judgment, that the court below rejected "sundry documents, letters, and other papers," not brought up with the record or in any way connected with it, but stated in the bill of exceptions to have been "to and from the parties in the suit touching the premises in question, and matters in dispute," and to have been offered by the plaintiff in error as rebutting evidence to the jury, though similar "letters, documents, and other papers as to dates" were previously read by the opposite counsel without objection by the counsel of the plaintiff in error, and without its having been adverted to by the judge, that they were dated after suit brought; and though the judge rejected the documents, letters, and other papers offered, on account of their being dated after the commencement of the action.

A submission of all matters in variance between the parties, is sufficient to authorize the arbitrators to award a partition of real estate, and to direct in what manner it shall be executed, provided the partition of the property in question, was one of the matters in variance at the time of the submission,

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but if the dispute arose afterwards, an award upon it is void for want of authority on the part of the arbitrators to make it.

A parol agreement for the partition of lands, is within the act of assembly for the prevention of frauds and perjuries, and does not pass the right which one party had at the time of the agreement to the other, in that part of the property allotted by the agreement to be held in severalty by the latter.

Nor are the facts of one of the parties employing and giving instructions to a scrivener to draw deeds for carrying the partition into effect, and going on the property with an artist and measuring off and designating the lines of division, according to the agreement, for the purpose of enabling the scrivener to draw the deeds and to describe the several allotments with accuracy, or of the other party withdrawing from the possession of that part of it which was, by the agreement, allotted to the former, and declaring that he held exclusive possession of the residue, which he intended to hold in severalty, according to the alleged agreement, such a part execution of the agreement as will take it out of the act against frauds and perjuries.

If the legal title to real estate be vested exclusively in one of two tenants in common, and the right of the other is merely equitable, being a trust resulting by operation of law from the purchase having been made with their joint funds, it is necessary under the act for the prevention of frauds and perjuries, that an agreement of partition should be in writing and signed by the parties or their agents, thereunto lawfully authorized in writing; and a parol agreement to make partition will vest no title either in the party holding the legal estate, or in him who has only an equitable interest, in the shares respectively allotted to each.

Arbitrators without a submission in writing, can neither make partition of real property between the parties, nor award a partition to be made, so as to pass the interest of each party to the other, in their respective shares.

An award of arbitrators "that the partition of the High street and Seventh street property agreed between the parties, according to the plan of M. B. shall be carried into effect" is void for uncertainty.

*THIS case came before the court on a writ of error [412] to the District Court for the city and county of *Philadelphia*, in which bills of exceptions were taken to the opinion of that court on points of evidence and in the charge delivered to the jury.

The action in the court below was a summons in partition brought to December Term, 1830, by Hyman Gratz, the plaintiff in error, against Simon Gratz, the defendant in error, for a four-story brick messuage or tenement and lot of ground, situate at the south-west corner of High street and Seventh street from the river Delaware, in the city of Philadelphia, containing in breadth on High street sixteen feet eight inches, and in length or depth on Seventh street ninety feet, together with the privilege of and attached to a four-feet wide alley on the southern boundary of the lot, and the water course therein, subject to the payment of a yearly rent charge of sixteen pounds, being an apportioned part of a yearly rent charge of thirty-two pounds.

Also, a four-story brick messuage or store and lot of ground situate on the south side of High street, and adjoining the foregoing messuage on the west, containing in breadth on High

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street fifteen feet five or six inches, or thereabouts, and in depth ninety feet, together with the privilege of and attached to the four-foot wide alley aforesaid, bounded eastward by the above described messuage and lot, southward partly by the said four-foot wide alley leading eastwardly into Seventh street, and partly by ground of Catharine Cox, westward by the next following described messuage and lot formerly belonging to Balthus Emerick, and northward by High street, subject to the payment of the yearly rent charge of sixteen pounds, being the remaining apportioned part of the above named yearly ground rent of thirty-two pounds.

Also, a three-story brick messuage or tenement and lot of ground situate on the south side of High street, at the distance of thirty-two feet or thereabouts westward from Delaware Seventh street, and adjoining the last foregoing described messuage and lot to the westward, containing in breadth on High street eighteen feet, and in length or depth one hundred and twenty-four feet, to a ten-foot wide alley.

Also, a two-story brick messuage or tenement and three-story brick messuage and lot of ground situate on the west side of Delaware Seventh street, between High and Chestnut streets, containing in breadth on Seventh street seventeen feet and extending that breadth from Seventh street westward the depth of eighty-one feet, where it widens on the north side thereof to the breadth of thirty-four feet to the ten-foot wide alley before mentioned, and from thence extending the last mentioned breadth the further depth of twenty-three feet, making in the whole depth one hundred and four feet, bounded northward partly by a messuage and lot now or late of Phineas Watson, and partly [*413] by the said ten-foot wide alley, eastward by Seventh street, with the appurtenances to the said messuages and lots of ground belonging.

The defendant pleaded *non tenent insimul*.

It appeared that the plaintiff and defendant, who were brothers, had been in partnership from the year 1797, until the 1st of January, 1827, when the partnership was dissolved. The property in question had been purchased with the partnership funds, but the legal title being vested in Simon Gratz, he held two undivided third parts of it for his own use, and the remaining undivided third part, in trust for the use of Hyman Gratz. After the dissolution of the partnership, the parties were at variance, and other members of the family were involved in their disputes.

For the purpose of putting an end to these disputes, the following agreement was entered into :

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"We, the subscribers, do hereby agree to submit all matters in variance between us and any of us to the award and arbitration of Charles Chauncey, Horace Binney, and Silas E. Weir, their award, or the award of any two of them, to be final and conclusive between us. And we do hereby give power to the said referees, to order and direct any conveyance, release, deed, or other instrument of writing whatever, from us, or any of us, to the other or others, and generally to order and direct us, or any of us, to do what they may deem expedient for the determination of our controversies, hereby agreeing, that no exceptions whatever shall be taken by us, or either of us, to the said award, and binding ourselves in honour as well as in law, to comply with the same faithfully, immediately on its being made known to us by the referees who sign the same."

(Signed,)

SIMON GRATZ,
HYMAN GRATZ,
JOS. GRATZ,
JAC. GRATZ.

Philadelphia, June 8, 1827.

"So far as I have any variance with any of the parties above mentioned, I do hereby covenant and myself a party make to the foregoing submission."

(Signed,)

BENJN. GRATZ.

The state of Mr. Weir's health not permitting him to act as a referee, an agreement dated May fourteenth, 1828, and signed not only by the parties to the submission of the eighth of June, 1827, but also by other members of the family was entered into, by which it was agreed, that the award of Messrs. Chauncey and Binney, and if they differed of any third person to be chosen by them, should be of the same effect as if Mr. Weir had proceeded in the arbitration and joined in the award; and the parties gave to those gentlemen the same power, and agreed to conform to their direction in the same manner as was provided in the submission to them and Mr. Weir.

*The matters submitted to the referees were numerous and complicated, and several awards were made from [*414] time to time in relation to them, but none of these awards embraced the property in question. The plaintiff and defendant being unable to agree as to the partition of it, they, on the tenth of February, 1830, agreed that Michael Baker, who was mutually chosen by them for this purpose, should "divide the property in High and Seventh streets, with the following objects:

"In the first place to make such a division as will be best, or most for the interest of the property:

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“In the second place to make the three lots as nearly equal in value as practicable; but not to injure the property by endeavouring to make them equal, and not to return any valuation thereof.

“The property to be divided is all the property of Simon and Hyman Gratz, at the south-west corner of High and Seventh streets, and the store and lot in possession of Thomas Harper and on the ten-feet alley on and running into Seventh street.”

On the twelfth of February, 1830, Mr. Baker made the following report:

Philadelphia, February 12, 1830.

“The subscriber, at the request of Messrs. Simon Gratz and Hyman Gratz, to divide the property at the corner of Seventh and Market streets, and the stores and lot that are occupied by Mr. Harper, as said property described by a plan given by said Gratz to the subscriber, numbered and marked in said plan, and to be divided into three shares; after due consideration, I have divided the same as follows:

“That is to say, No. 1 and No. 6 consist of one share, and the vaults under the yard, with the privilege of said alley back, and use of said privy forever, with one thousand dollars paid by No. 3 and 4 to this share; the said share receiving the above amount, and use of said alley, as laid down in said plan.

“No. 2 and 5 consist of one share, agreeably to the plan given, with the exception that No. 3 have the privilege of a privy in the small alley next to Cox’s estate; and this share to have the privilege of the alley laid down on the plan, with the use of the privy and alley, and the ground that the fire-proofs are on, to be so divided, that each fire-proof remains as they now stand, with one thousand dollars paid by No. 3 and 4 to this share.

“No. 3 and 4 consist of one share, agreeably to the plan given, with the right of alley as laid down on said plan, and have the privilege of a privy forever, in the small alley adjoining Cox’s estate, with the ground that the fire-proof stands on, to be so divided that the fire-proofs remain as they now stand, and the share to pay each of the other shares one thousand dollars, this ground rent to remain on the shares as they now are.”

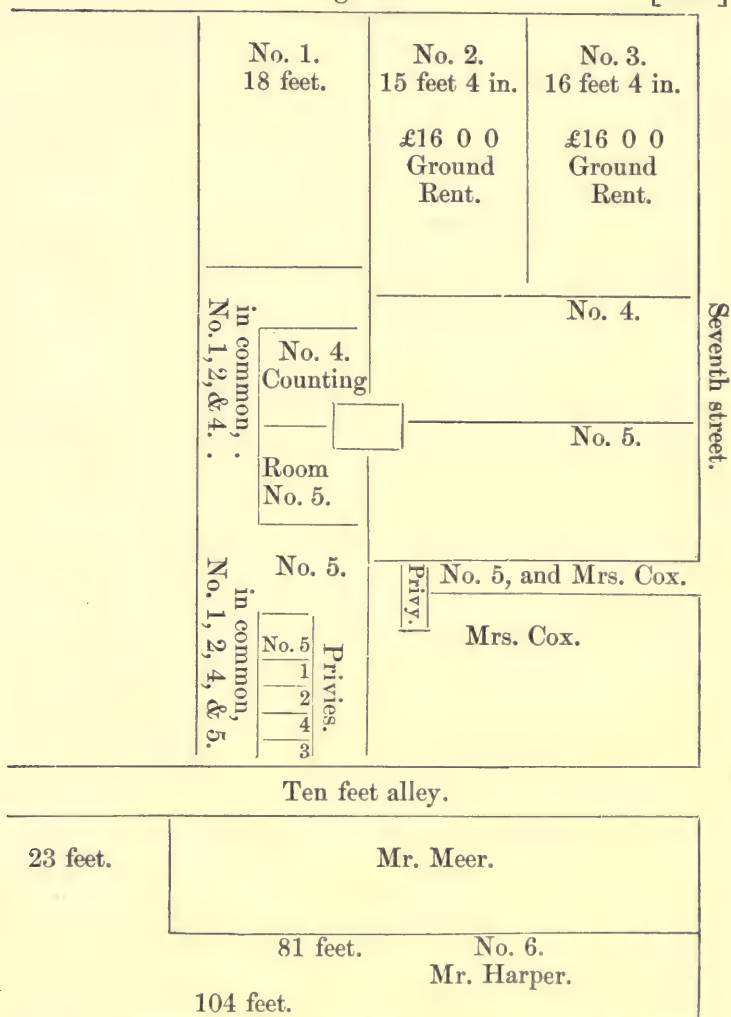
(Signed,) MICH. BAKER.

The plan referred to by Mr. Baker is here given:
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*High street.

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On the day of the date of Mr. Baker's report, Hyman addressed a note to Simon Gratz, in which he informed him that Mr. Beates, the conveyancer, had orders to draw the deeds, and that on Monday morning following, Mr. Hains, the city regulator, would make a survey of the property, and return a draft of it to Mr. B. On the fifteenth of the same month, Hyman wrote again to Simon, saying, "that as the division of our joint

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[*416] property which was proposed on *Friday last, will not make an equitable or equal division according to its value, which was the object intended by it, I shall decline entering into the arrangement, and shall retain my one-third interest in the property." On the same day Simon wrote a note to Hyman in which he said, "we having confirmed Mr. Baker's division of our property on High and Seventh street and on Seventh street, and having divided the same in the presence of Messrs. Binney and Chauncey, I shall require the deeds to be executed and delivered in conformity to that agreement. Should there be any loss of interest in consequence of your non-compliance, it must necessarily fall on you. I am prepared to carry into effect all which it is incumbent on me to perform in the premises." On the sixteenth, Simon gave notice in writing to Hyman, that the referees would meet on the following day. On that day Hyman read before the referees a paper, in which he stated, that they had not agreed and could not agree, and then proceeded to point out the inequality of the partition, and his reasons for not agreeing to it.

On the same day the referees made an award in these words:

"Philadelphia, February 17th, 1830.

"Gentlemen,—We are of opinion, and do award, that the partition of the High street and Seventh street property, agreed on between you, according to the plan of Michael Baker shall be carried into effect.

Respectfully yours,

(signed)

CH. CHAUNCEY.
HOR. BINNEY."

Messrs. Simon and Hyman Gratz.

A paper dated March 3d, 1830, was drawn up by Hyman Gratz, and read by him to the referees on the 9th of that month, in which he entered at length into his reasons for declining to acquiesce in their award of the 17th of February, without making an effort to induce them to review their opinion, which he considered highly prejudicial to his interests. Among other things, he stated, that it was true that when the plan was returned by Mr. Baker, and before the referees, he said that Simon might have his selection, but that it was an unguarded and unreflecting concession, made by him without a correct understanding of the partition, as made by Mr. Baker, and ought not to be considered as binding on so important a part of his whole property.

A paper also dated the 3d March, 1830, was read by Simon Gratz to the referees, in which he opposed the rehearing requested by Hyman, and gave his reasons therefor.

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On the 21st of April, 1830, the referees transmitted to Messrs. Simon and Hyman Gratz, the following note :

"Gentlemen.—After much reflection upon the subject of our award of 17th February last, in regard to the real estate on High and Seventh streets, and with sincere regret at the want of concert between *you in carrying that award into effect, we are under the necessity of declining to make [*417] further award in relation to it.

We are Gentlemen, respectfully, your obedient servants.

(signed) HOR. BINNEY,
CH. CHAUNCEY."

Messrs. Simon and Hyman Gratz. April 21, 1830.

After several notes had passed from Simon to Hyman Gratz, from the referees to Hyman Gratz, and from him to them, the referees addressed to that gentleman, the following note :

"Sir,—We have omitted hitherto to answer your letter without date, in reply to ours of the 29th ulto., in consequence of other engagements.

"To so much of it as regards the distinction between awards made by the referees, acting upon and exercising their own judgments, in relation to the matters awarded, and that which you suppose has not been so made, we reply, that the distinction arises from misapprehension. We have made no award without acting upon and exercising our own judgment, in relation to the matter submitted to us. In the case of the partition, we exercised no judgment in regard to the manner in which it should be made; because that matter was not submitted to us, nor have we made any award upon that point. The question to us was whether an agreement, made in our presence, in regard to a mode of partition, made and assented to by the parties, should be carried into effect. Upon this matter in dispute, to wit, the agreement, we acted, and exercised our own judgment, as we have done in all other cases, and have made our award in conformity to it.

"To the request contained in your former note, that we should receive certain money from you, and deliver you certain deeds, we are under the necessity of replying, that we cannot accede to the request. The award, in regard to the agreement of partition, has an immediate bearing upon this matter; and we cannot agree to change the present situation of the parties, without the consent of both.

"We are, respectfully, your obd't serv'ts,

CH. CHAUNCEY,
HOR. BINNEY."

MR. HYMAN GRATZ.

Phila., May 12, 1830.

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A considerable number of other notes, letters, and papers, passed between the parties and the referees, relative to the various matters in dispute between the parties, as well as to the partition of the property in question, and were given in evidence on the trial, but it is unnecessary to state their contents.

Horace Binney, Esq., who was examined on the trial in the court below, on the part of the defendant, deposed as follows:— A great many times in the course of between two and three years the parties appeared before us. This tribunal was constituted for the purpose of settling differences which were numerous and complicated beyond my conception before I entered [418] upon the duty. The family had been *apparently in great confidence for many years, and had closed very little as respected themselves. The controversies had spread over twenty-seven or twenty-eight years. They had an immense field of dispute, involving all kinds of property and a great variety of transactions. My impression is, there were between sixty and one hundred points upon which we awarded. We took up these controversies as presented; as each was made known to us we proceeded to the consideration of it; and after hearing all that these gentlemen thought proper to give evidence of, we would pass to another matter; often going to other work before coming to a decision; and then we would frequently make provisional awards to show that we did not dispose of all the matters submitted to us. In fact we were a sort of standing tribunal for these gentlemen, for the space of between two and three years, to dispose of all matters which they stated to be in controversy between them.

It happened in one instance, after we expressed our opinion that it was suggested that the matter required reconsideration and we gave it.

My recollection as to partition is pretty strong. We kept no record, but notes of our awards. Before anything was done at the meeting at which the paper addressed to M. Baker was prepared, a wish was suggested, and I think by Mr. Hyman Gratz, that the referees should divide this property themselves. But on its being remarked by one of us that we did not feel ourselves competent to the discharge of that duty, there was no further expression of that wish. But it was still desired that we would assist them in promoting the partition by themselves, or by others for them, to which we made no objection; and it was accordingly at this meeting desired by both the gentlemen, that we should draw up heads of instructions to be given to Michael Baker to govern him in the plan of division. Mr. Baker's name was not suggested by either of the referees, but the gentlemen gave us to understand he was mutually agreeable

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to them, and they wished this should be communicated to him as our request. I have no distinct recollection of the terms, except that there was to be no valuation. That seemed to be indispensable by one of the gentlemen and not opposed by the other, and accordingly these heads of instruction were drawn up by myself and approved by both the gentlemen. I did not see Mr. Baker myself until he was called as a witness at the counting-house. The referees were brought together at a subsequent day, after we heard Mr. Baker had executed his duty, and the proceedings of that day I have as fresh a recollection of, as if they occurred yesterday. The plan of division reported by Mr. Baker was read to us. Simon Gratz said he was not altogether satisfied with it, and Mr. Hyman Gratz said he was; that he thought it a very good partition. Simon said he thought it had not been made in conformity with the instructions, which said there should be no valuation, whereas Mr. Baker reported that one was to pay the other. Mr. Hyman Gratz repeated his belief that the partition was a just and proper *one, and said, I am so satisfied of its equality [*419] that I am willing Simon shall have the two first choices, or the first selection of two lots. To which Mr. Simon Gratz replied, if that is understood I have nothing more to say. Mr. Hyman Gratz repeated his willingness again; and then Mr. Simon Gratz said he took Nos. 1 and 6, and Nos. 3 and 4; after he said this Mr. Hyman Gratz said that he was perfectly satisfied, and the parties and referees then adjourned.

The title papers were with Mr. Chauncey, and I have no particular recollection as to what took place as to deeds. Some few days after this, I understood that Hyman was dissatisfied with the allotment. We were called together, as was the practice, and we came together. As I understood, the particular matter in dispute was, whether this agreement, made in our presence, should be carried into effect. Simon advanced reasons why it should be, and Hyman why it should not be; and after we had heard them as fully as either of them deemed necessary,—they never were restricted—we determined the interview; and neither of us thinking that anything had been shown why that agreement should not be carried into effect, made an award, conformably to our practice, that it should be.

We were afterwards requested by Hyman to review the award, and it was particularly desired that we should see the property and hear the testimony in regard to it, by Mr. Hyman Gratz. Mr. Chauncey and myself were doubtful whether we should take that course; we had formed and expressed no opinion relative to the partition, and to hear evidence relative to the character and propriety of it, seemed to go out of the submission which

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had reference to the agreement, and not to the character of the partition. We, however, concluded to go, knowing that we were the masters of our own judgment, and wished to do what was agreeable to the gentlemen, of whom we were the friends, as well as acting in the professional character. We did go: and there was a meeting at the property; Mr. Baker and Mr. Beates were there; we went over the property to the ridge-pole of the house, and we heard and saw whatever was offered to us to see and hear, and finally communicated to them, that we did not think it right or proper to make any other award than we had done. I was governed, myself in that course, by this consideration, and I have no reason to think that Mr. Chauncey acted under any other. I was present, and heard the agreement in regard to Mr. Baker's interference, and the subsequent allotment, and I had no recollection then, and have not now, that Hyman Gratz ever made any suggestion that he had not made the agreement; that he had not made the offer to Simon to make his choice, and expressed himself satisfied afterwards. I have no recollection of any express confession or concession of our authority to decide, nor of any express denial at the meeting preceding the award. The acts at that meeting on the part of Hyman Gratz, consisted of a statement of his objections to carry that agreement of partition into effect. I have still [*420] a recollection of some of the circumstances that he alleged as his reasons; one was a mistake, or oversight rather, in not perceiving that Mr. Baker had given a privilege of the alley to No. 3, though it was on the paper of Mr. Baker very clearly; another was, it came in the end to the inequality of the partition; pointing out expenses and inconveniences; these matters were submitted to our consideration, and certainly to our judgment. There was no difference between this and the fifty meetings we had had. I do not recollect that these gentlemen ever questioned our authority to do anything relative to their difficulties. The authority was just as broad as the controversies, and there was little on which they did not disagree; it was one general and pretty universal discord. At a subsequent day, two or three months after, Mr. Hyman Gratz did address a letter, which contains some doubt of our authority. It is the letter of the 25th of June.

"It never was a subject referred to the arbitrators, whether that division of the property should be carried into effect or not."

Previous to this, there was a communication, stating that we had not brought our judgments to bear upon it. He brought directly before us the character of that agreement. He said he had made it hastily, inconsiderately, at the meeting preparatory

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to the award. This sort of interference by us, occurred more than once, of directing things to be done, without doing them personally by ourselves. They agreed that western lands should be sold; we did not judge of the price, but directed that power should be given to agents to sell accordingly. These acts were not at all distinguishable from the one in question. There was something like a rough calculation made by Hyman at the meeting, as to what he would have to pay for his part of the incumbrances to have his property clear. They parted with the express determination to carry that partition into effect.

No distinction appeared at any time between the questions that arose after the submission and those before. One arose entirely subsequent, and might be considered altogether independent of the original controversy. While we were holding under advisement how money belonging to a foreigner should be disposed of, we were informed that Joseph Gratz had taken out administration to Jonas Heirshel Black; we directed them to be cancelled, and Simon and Hyman Gratz to administer. The order I believe was acquiesced in. I know of no instance of an union between the parties except when we directed; and when we did direct, generally no want of acquiescence. Towards the last, when there were mutual awards, there sometimes was difficulty. We ordered conveyances as to property of which Hyman had not the title. Jacob Gratz had the title to No. 6, and we directed the conveyance. Hyman Gratz having no title to the property, we directed that deeds should be executed, and handed to us as escrows, and remain with us to be delivered over to Hyman. They never were so delivered. They were to be, when a condition should be performed which we never considered complied with.

*My impression is—I have no recollection of anything that prevented the delivery of the deeds for the corner [*421] property, when that for the Harper property was delivered, except the existence of incumbrances given by Simon alone. I have no recollection of Simon Gratz stating, that this mode of subdivision would be injurious to the whole property, or that this block ought not to be divided. I have nothing on that subject that ought to be stated as evidence. There is nothing at all on my mind like the first—there is a vague impression that something was said about the block going altogether—except what is said in his letter of the 3d of February.

Charles C. Bauncey, Esquire, was also sworn, and gave the following evidence.—I think Mr. Beates called on me after one of the gentlemen for the deeds, and I delivered them to him. My recollection, as far as it goes, induces me to suppose Mr. Binney's statement is accurate. We did distinctly state in the first

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instance, that we did not consider the partition of real estate within our province, and said, "if you cannot agree among yourselves, that is a matter you must go into the courts for." The agreement was made exactly as Mr. Binney has stated, in our presence. Subsequently, I think, there was at one time some attempt made to obtain a valuation. Paul Beck, Mr. Richards, and Horner were named; perhaps that was as to the rents that should be paid by Simon Gratz & Son for the store occupied by them. I rather think it was. I have no recollection of anything material in addition to what Mr. Binney has stated. We inspected the property, and heard the statements of Mr. Baker and Mr. Beates. I believe they were brought by Hyman Gratz before us.

I think the non-delivery of the deeds for the undivided third, was caused by the existence of incumbrances. The incumbrances were for the benefit of the firm.

Isaac Prince, who was likewise examined, testified as follows:—Mr. Simon Gratz has held the parts allotted to him by the division, No. 1, and No. 3, and No. 6. He is in the habit of getting the rents, from since the twelfth of February. The division No. 4, is occupied as a store by Simon Gratz & Son, the rent of which was credited to S. & H. Gratz up to twelfth of February, 1830. He has had nothing to do with No. 5; it has been unoccupied—shut up for a long time. I do not know where the keys are. They are in the possession of Mr. Hyman Gratz, I believe.

Mr. Oakman occupies No. 2. Walls have been run up by Mr. Simon Gratz, so as to make the properties distinct, between Nos. 4 and 5, and between 4 and 3 and 2.

Mr. S. Gratz made leases of the property held as his share. I am familiar with his concerns. I know of no act of ownership exercised by him on the parts said to have been allotted by him to Hyman Gratz, since the division.

I should say between three and four years ago, this dispute was before referees. At the time of the dispute, No. 5 was occupied as the counting-room of S. Gratz & Brother; No. 4, [*422] as the store of S. *Gratz & Son; the other properties were under rent. Hyman has not, that I recollect, for some time interfered with Simon Gratz's possession. I occasionally collected the rents of the property, previous to twelfth of February.

The privy in the alley has not been used by Mrs. Cox for a great many years. Now it is used as a scale room for weighing—has been for many years. The privies in actual use are five, as on the plan.

Privy No. 5, is used by Simon Gratz & Son. The alley next

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Mrs. Cox is not used at all, except to go to the scale room, by S. Gratz & Son.

I do not recollect who uses No. 4; we have no key of it. I believe it is not used.

After the division of the property, twelfth of February, 1830, Mr. Oakman called to pay his rent, which I refused to receive, from the belief that it was not the property of S. Gratz.

Frederick Beates was also sworn and examined, and stated as follows:—Hyman Gratz called on me of a Friday, twelfth of February, 1830. He stated he wished to see Mr. Chauncey, to get some papers necessary to draw a deed of partition between S. Gratz and himself. Hyman Gratz gave me a rough plan of the division. He stepped with me to Mr. Chauncey's to get the papers, which I received from Mr. C., and having glanced my eye over the plan I got from Mr. Chauncey, and the one from Mr. Gratz, I found they were not so distinct as to enable me to go on and draw the deeds. Some lines were not mentioned, and I said there must be a survey. A deed, and the report of Mr. Baker, and a draft, I received from Mr. Chauncey. Finding a survey necessary and a proper draft, Mr. H. Gratz returned with me to Third and Arch street; he left me then and said he would go to Mr. Haines and get him to make the necessary survey and draft. On coming home and looking at the papers I got from Mr. Chauncey, I found there was a privilege given to Simon Gratz in a lot, that I apprehended was to be allotted to Mr. Hyman Gratz, that I did not apprehend was intended to be given to him. I met Hyman Gratz next day, Saturday, in Fourth street, and told him I discovered a difference between the papers. He told me it was impossible. He called on me on Monday to satisfy himself, I suppose about my being correct. On his perusing the papers he found I was correct. He said it was not right—seemed a good deal chagrined and mortified. He then wished me to return the papers again to Mr. Chauncey. This note I wrote the sixteenth of February, 1830.

“At the request of Mr. Hyman Gratz, I return you the inclosed documents.”

I was requested by Mr. Simon Gratz to get them again. I asked Mr. H. Gratz for some explanation, and he said he would have nothing to do or say with it—that was when I had Haines' draft. I can't exactly say when I got Haines' draft. I did not get it for a *considerable time after the other. He called at the [*423] office and treated this as if he had no concern with it.

“Charles Chauncey, Esq. Dear Sir: Please let me have the draft made out by Mr. Hyman Gratz, of the Market street

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property ; neither of them I have, show the understanding respecting the division walls. Yours humbly,

FRED. BEATES.—23d Feb., 1830.”

This was after I got an explanation from Simon Gratz. I don't know whether I had Mr. Haines' at the time when I got back the papers. This was the draft sent, with the pencil-mark upon it. It was necessary to incorporate it in the deed.

The deed was signed by Simon Gratz, and left with me to be signed by Hyman Gratz, and then consummated and witnessed. It was left with me a considerable time. I told Hyman Gratz when he came there, it was left by his brother for signature. He said he had nothing to do with it. The dot is often made by the magistrate when one of the parties executes and acknowledges the deed.

I believe I got Haines' survey from him.

I was examined before Messrs. Binney and Chauncey. I can't say who took me before them.

Samuel Haines was also called as a witness, and gave the following testimony :—In the early part of February, 1830, Hyman Gratz called on me and said, he and his brother were about making a division of their property at the corner of Seventh and Market street, and wanted a survey and plan. The weather was cold and unfavourable, and I was prevented from going ; and a message was sent to me to make haste. I understood the message to be from Hyman Gratz's counting-house. I afterwards went, on the fifteenth of February. Both of the parties were there during the time of making this survey and measurement. I made a plan of it. That plan was delivered by me to some person : I don't remember. Previously to making the plan, I received a message, as the person said, from Simon Gratz. The plan was eventually in the hands of Mr. Beates when I attended to give him an explanation of it, to enable him to draw the deeds as I understood it. Mr. Hyman Gratz was the first person who called on me. I had no papers but a little plan. Everything I understood as coming from Hyman Gratz—so much, that I did not pay much attention to it. I do not know from whom I got the papers.

I took a measurement on the ground, marking the lines on the walls.

I think No. 1 is the plan. It is likely I got this No. 1, at the counting-house, while I was on the ground, for the purpose of measuring. I think Mr. Simon Gratz requested me to be careful of it, and return it to him or somebody else.

The No. 1 is the only plan I ever had in my possession, I think. I say with caution, that I think I went to the ground

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without one. My impression is, I returned it to Mr. Simon Gratz's messenger. A messenger came to me, as I understood, from Simon Gratz, to hasten *me. The messenger was a young man. He called more than once. I think it [*424] was the same person who first called.

I think it was not Mr. Prince who called. There were young men in the counting-house that I took for M. Gratz's sons, and I thought it was his son that called on me.

The bill of exceptions returned with the record, after the introductory part of it, and after referring to certain evidence which had been given by the parties on both sides, proceeded thus :

"And in the further progress of the trial, the plaintiff offered Michael Baker as a witness, who was qualified, and testified as follows :

"My impression is, that both were together. I objected to having anything to do with the property. I was told by both those gentlemen that I was to take the plan, and divide the property into six numbers. I divided the property equitably, as I thought, and returned a report to that effect. This is the report. Nos. 2, 3, 4, and 5, is the property that was most suitable together—'

"At which period of the testimony the witness was stopped by the counsel for the defendant, who objected to the last clause of the witness's testimony (the objection to be considered as having been made before the witness gave that part of his testimony, as opinion of the best mode of dividing, &c.,) and after argument, the testimony objected to was overruled by the court; whereupon the witness was withdrawn by the plaintiff's counsel as to any further testimony, and the plaintiff's counsel excepted to the opinion and decision of the judge.

"And in the further progress of the trial, the plaintiff's counsel offered to read, as rebutting evidence to the jury, sundry documents, letters, and other papers, (prout letters, documents, and other papers annexed,) of a date subsequent to the commencement of the suit, but the same was objected to and overruled by the judge; the same being letters, documents, and other papers, to and from the parties in the suit, and touching the premises in question, and matter in dispute, and similar letters, documents, and other papers, as to dates, having been read previously by the defendant's counsel, without objection by the plaintiff's counsel, and without it having been adverted to by the judge that they were dated since the suit brought. Whereupon the counsel for the plaintiff excepted to the decision and opinion of the court in objecting to and overruling such evidence so offered by the plaintiff's counsel."

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In the further progress of the trial, before the judge charged the jury, the counsel for the plaintiff requested him to instruct the jury as follows: to wit,—

“1. The parties have not made a legal partition of their joint estate; because there must be a writing signed by the parties or by the plaintiff, or by an agent thereto lawfully authorized by him, granting, assigning, or surrendering the two-thirds of the premises to Simon Gratz in severalty.

[*425] “2. There is not a sufficient writing signed by the parties or by Hyman Gratz, granting, assigning, or surrendering the two-thirds of the premises to Simon Gratz in severalty.

“3. There is not a sufficient writing signed by any agent of Hyman Gratz, thereto lawfully authorized by writing, granting, assigning, or surrendering the two-thirds of the premises to Simon Gratz in severalty.

“4. The two-thirds of the premises have not been granted, assigned, or surrendered to Simon Gratz by act and operation of law.

“5. That any parol agreement by Hyman Gratz sufficient to grant, assign, or surrender the two-thirds of the premises to Simon Gratz, must be found by the jury to have been partly performed by Hyman Gratz; otherwise it does not vest the two-thirds of the premises in Simon Gratz in severalty.

“6. That any possession of Simon Gratz, given in evidence by him as part performance of such agreement, must be a possession of the two-thirds of the premises obtained by the mutual consent of both parties, and delivered or assented to by Hyman Gratz, in pursuance of and in order to execute such parol agreement.

“7. That the instructions by Hyman Gratz to Beates to prepare the deeds, to Mr. Haines to make a survey of the premises, and the marking the division lines by Mr. Haines, are not a part execution and performance by Hyman Gratz of the parol agreement, unless the jury are satisfied that afterwards Simon Gratz went into the possession of the two-thirds of the property by the plaintiff's consent.

“8. That the receipts of the rents by Hyman Gratz, given in evidence on the part of the defendant, are not a part performance or execution of the parol agreement by the plaintiff, nor are they in law a taking possession of the houses, for which the rent was paid as the separate property of the plaintiff.

“9. That the award of the seventeenth of February, 1830, vests no separate estate in the parties, because it does not direct that mutual releases, conveyances, or assurances be executed by the parties.

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"10. And that if it had so directed, it would not have been binding on the plaintiff, unless acquiesced in or executed by him.

"11. That the estate of the parties in these premises was by the title deeds to Simon Gratz, and the entries in the books of S. and H. Gratz, an estate in joint tenancy.

"12. That the estate of the parties in these premises is embraced within the provisions of the statute of frauds and perjuries.

"That if the court should be of opinion that the estate of these parties was such an estate as not to be within the statute of frauds and perjuries, then the plaintiff's counsel requests the court to charge the jury.

"13. That the estate of the parties was an estate in joint tenancy, and that in such case partition of such estate could only be made by these parties by deed.

"That if the court should be of opinion that the estate of the parties *was not within the statute of frauds, and was not an estate in joint tenancy, but an estate in [*426] which they were tenants in common, then the plaintiff's counsel request the court to charge the jury.

"14. That the partition could then only be made by these parties, by a parol agreement, accompanied by the possession of the two-thirds of the premises delivered to Simon Gratz by the plaintiff, or assented to by him, in pursuance of the parol agreement."

His honour Judge Hallowell proceeded to charge the jury as follows :

"This is an action by Hyman Gratz against Simon Gratz, to effect a partition between these parties, who are joint tenants or tenants in common ; the plea is, that they do not hold together.

"The question between these parties can be settled on fair and simple principles. Much has been said in relation to the statute of frauds, and a parol agreement, and if the plaintiff can recover on an equitable estate.

"I shall say nothing on part performance or ouster. There is matter in the cause which can settle it without either. And I shall confine myself pretty much to what is called the submission and the award.

"These parties were partners ; the partnership was dissolved in January, 1827. They were at variance, and they resorted to a domestic tribunal, in order to settle all things in difference that had, might, or should occur between them. (The judge here read the submission of the 8th of June, 1827.) This submission was signed by the parties and other members of the family.

"Mr. Binney and Mr. Chauncey tell you of their idea of the

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cast of the writings. But we are to judge not merely by the writings, but by the acts of the parties. They tell you of the transactions of the parties, of their discord, &c.; they were obliged to call their friends together.

"In 1830, Hyman was desirous of dividing the property. He drew a plan; sent it to Simon; they could not agree; one or other of them, no matter which, called these gentlemen together; they proposed the referees should divide it; the referees said no, we do not understand the business; the name of Mr. Baker was suggested, I believe, not by the referees, perhaps it does not appear by whom, and agreed to; he took the plan, made a division, and when the division was made, the parties appeared before the referees; Simon said he did not like the division; made some objection; Hyman said it was a fair division, and after some conversation, Hyman said to Simon, you may have your own choice; and before they separated, the division by Mr. Baker was agreed to by both parties. Hyman was well pleased; Beates was spoken to, and Haines was spoken to as to the survey. On Friday, the 12th of February, Hyman suggested to Simon that there was some difference, or made some observation in respect to a privilege or alley. However, there was [*427] some *conversation in respect to a privilege or alley. Hyman said it could not be so. On Monday, Hyman said he was not satisfied. Some days after he wrote a note that he was not agreed, and would retain his one-third interest. Mr. Binney drew up instructions to Michael Baker how to conduct himself in making the division.

"On the afternoon of the seventeenth, the referees and parties met. Hyman Gratz exhibited a long argument in writing, containing reasons why that partition should not stand, and why it should not be carried into effect. The referees, a few days after, wrote to the parties, that they had considered the subject, and that the partition should be carried into effect. On the 3d of March, 1830, Hyman Gratz writes a long letter to the referees. I intended to have read some of these papers, but will merely refer to them. On the 17th of February, the referees awarded that the agreement should be carried into effect. To the 3d of March, the referees were under an impression that it was carried into effect. On the 3d of March, Hyman Gratz begs the referees would review the order they had made; it was reviewed, and on the 2d of April, they wrote a note to Simon and Hyman, that after much reflection, they could not interfere. On the 17th of February, they awarded; they reviewed, reflected, and ordered the award to stand.

"The only real question then is, whether this determination by these gentlemen was conclusive between the parties and is

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conclusive; if it be, by the plea the parties do not hold together, and the action cannot be supported.

“It is said first, that it is not within the submission. If there be any doubt we must take into consideration the situation of the family, and say whether it is not the true meaning of these parties that it should operate on all differences between the parties. Many things occurred afterwards: they were bound to go to these referees for anything they could not agree among themselves about. The agreement of 1827 did not oblige the parties to go before the referees for anything they could agree about themselves, which is exemplified by the trust lands, and one instance where a writ of partition was resorted to. Was this then within the submission? Had the referees jurisdiction of the matter in the manner they took it up? After Hyman was dissatisfied, resort was had to the referees by Simon: both go there: Hyman does not say, you have nothing to do with this matter; you will find that he argues this matter, and endeavours to show that this partition should not be carried into effect. He does not say it is *coram non judice*, but he submits to their jurisdiction; both parties do; and Hyman never intimates any want of authority on their part. Mr. Binney says he does not recollect of any such objection until very late. Mr. Chauncey the same. When a man comes into a forum, his first thing is to plead to the jurisdiction, which he must do, or he is concluded. My opinion is, that on the agreement of June, 1827, the documents and general conduct of the parties, these gentlemen had jurisdiction to do what they did, to make the award that this *partition by Michael Baker should be carried into effect. [*428] They have shut up a great many things by this award. Whether the agreement by parol of the 12th was binding, was shut up by the award, for it was competent for Hyman Gratz, to have said to the referees, you are lawyers, this agreement was by parol, and void, and I ask to be exonerated; he does not; there is no knowing what might have been their decision; but everything was shut up and concluded by the award.

“My opinion is that this matter, whether the partition made by Michael Baker was valid or not, was within the jurisdiction of the referees, and their decision is binding and conclusive between the parties. My opinion is founded on the award, and that it is binding and conclusive. A number of other points have been submitted to me by the plaintiff's counsel, and they may consider that I decide them in their favour, except so far as they are qualified by the special charge now given. For the matter of the award on which I have fully charged, is sufficient to enable you to make up a verdict, which I advise you to find for the defendant.”

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The jury having retired, the judge afterwards sent for them into court, and on their appearing, said,

“I want to say something by way of explanation as to the plaintiff’s points. On examination of them I have found this proposition which I wish to explain.

“The award of the seventeenth of February, 1830, vests no separate estate in the parties, because it does not direct that mutual releases, conveyances, or assurances, be executed by the parties.

“If I were to let this go to you without explanation, I might appear inconsistent. I meant to tell you, and now I tell you, that the award of the seventeenth of February, vests a separate estate in Simon Gratz, as two-thirds of the property, and that the effect of the award is to direct that mutual releases, conveyances, &c., be executed.”

The counsel of the plaintiff excepted to his Honour’s opinion, and in this court filed the following

Specification of Error,—“1. Because the judge overruled the testimony of Michael Baker, witness for the plaintiff. His testimony was as follows :

“My impression is, that both were together. I objected to having anything to do with the property. I was told by both those gentlemen, (plaintiff and defendant,) that I was to take the plan and divide it into three shares. I divided the property equitably, as I thought, and returned a report to that effect. This is the report. Nos. 2, 3, 4, and 5, are the property that was most suitable together.

“The error assigned is in overruling the last sentence of his testimony ; ‘ Nos. 2, 3, 4, and 5, are the property that was most suitable together’—and thereby precluding the plaintiff from giving that and further testimony of the basis on which he had founded his report.

[*429] * “2. Because after having admitted in evidence on the part of the defendant, sundry letters and other papers of a date subsequent to the commencement of the suit, the judge rejected sundry other letters and papers, to and from the parties to the suit, concerning the subject-matter in dispute before the jury, but which were of a date subsequent to the commencement of the suit, and which were offered in evidence on the part of the plaintiff as rebutting testimony.

“3. Because the judge erred in charging the jury, that his opinion was, that on the agreement of June, 1827, on the documents and general conduct of the parties, these gentlemen (Mr. Binney and Mr. Chauncey), had jurisdiction to do what they did, and to make the award that this partition by Michael

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Baker should be carried into effect, and withdrew the consideration and decision of the facts of the case from the jury.

"4. Because the judge erred in charging the jury that this matter whether the partition made by Michael Baker was valid or not, was within the jurisdiction of the referees, and that their decision was binding and conclusive between the parties; inasmuch as the question of jurisdiction depended on facts as well as documents, which the jury were thereby precluded from considering.

"5. Because the judge charged the jury to find a verdict for the defendant in such a manner as to leave the jury to understand that the evidence offered by the plaintiff was wholly insufficient and immaterial, and that the award alone was so binding and conclusive on the jury, that their verdict ought to be for the defendant, without regard to any of the plaintiff's evidence.

"6. Because there was error in the manner of the judge's deciding the points of law made by the plaintiff's counsel, for the purpose of obtaining his charge thereon to the jury.

"7. Because the award of the seventeenth of February was of matters not submitted by the parties; and the judge erred in charging that it was.

"8. Because the judge erred, when he subsequently sent for the jury into court, in charging them (in explanation of his previous charge, that he had decided all the points of the plaintiff in the plaintiff's favour) that the award of the seventeenth of February, vested a separate estate in Simon Gratz as to two-thirds of the property, and that the effect of the award was to direct that mutual releases or conveyances be executed by the parties.

"9. Because his advice to the jury to find a verdict for the defendant, is inconsistent with a decision in the plaintiff's favour of the points made by the plaintiff, with the explanation added.

"10. Because these points, with the explanation added, entitled the plaintiff to a verdict.

"11. Because the judge erred in charging, that the submission and award, and their validity in this case, were a question of law, and that the law thereon was with the defendant, and the verdict should be for him.

*"12. Because the judge erred in charging the jury, [*430] that the parties had made a legal partition of their undivided interest in the property in question, exclusive of the evidence relating to the provisions of the statute of frauds, and part performance to take the case out of operation of that statute.

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"13. Because in charging that the award itself (or alone) was binding and conclusive on the plaintiff, the judge delivered contradictory or inconsistent law to the jury, having determined in one of the points, that it was not binding on the plaintiff, unless acquiesced in or executed by him."

After argument by *Purdon* and *J. Randall* for the plaintiff in error, and by *J. R. Ingersoll* and *J. Sergeant* for the defendant in error,

The opinion of the court was delivered by

KENNEDY, J.—The first and second errors consist of exceptions to the opinion of the court below, in overruling testimony offered by the plaintiff in error, who was also the plaintiff below.

The first is, that the court prevented the plaintiff from showing that in making a partition of the property in question, into two parts, one whereof to contain one equal third part, and the other two equal third parts of the whole, that the parcels of the property numbered 2, 3, 4, and 5, upon the ground plot exhibited, would have been more suitable for making up the division, which was to contain two equal third parts of the whole, than any other of the six numbers which embraced the whole of it, according to the plot. I cannot say that I perceive any error in rejecting this evidence; for if the parties, as was alleged by the defendant, had by agreement between them, made a partition of the property, by which other numbers than those of 2, 3, 4, and 5, were associated for the purpose of forming the division which was to contain two equal third parts of the whole of it I do not think it would have been sufficient to have set such partition aside, to have shown that in the opinion of witnesses, a more equal and convenient partition of the property might have been made, by joining Nos. 2, 3, 4, and 5, to make up the allotment of two-thirds. And unless the testimony so rejected were offered for this purpose, I cannot perceive that it had any pertinency to the issue trying, and believing it altogether insufficient to effect such an object, I am therefore brought to the conclusion that it was properly refused.

With respect to the second error, as the sundry documents, letters, and other papers mentioned in the assignment of it, which are alleged by the plaintiff's counsel to have been offered by them as rebutting evidence to the jury, and to have been rejected by the court, do not appear to have been brought up with the record, or to be connected with it in any way, we cannot see it, and have no means of knowing what it was, whether it had any bearing upon or relevancy to the issue or not; and how is it possible for us then to determine upon its

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admissibility? But, it is said, that these letters, documents, and other *papers rejected by the court to be received [*431] as evidence, are stated upon the record to be to and from the parties in the suit, touching the premises in question and matters in dispute; and that similar letters, documents, and other papers as to dates, were previously read by the defendant's counsel without objection by the plaintiff's, and without its having been adverted to by the judge that they were dated after the suit brought, and as it was on account of their being dated after the commencement of the action that they were rejected, it was error in the judge to do so. It would not be right to test the admissibility of evidence by the insufficiency of the reason assigned by the court below for rejecting it. A right judgment is not to be reversed on account of a wrong reason given for rendering it. What those letters and other papers given in evidence previously by the defendant were, does not appear, more than those which were offered by the plaintiff and rejected by the court. But, admitting that they were letters, &c., "touching the premises in question and matters in dispute," it does not follow that they were in any possible view material to the issue. What does the term "*touching*" mean, as used here, upon which great stress has been laid?—simply "*mentioning*." The court below, then, refused to receive in evidence letters, &c., mentioning the premises in question and matters in dispute. Now, nothing can be more easy than to imagine, that writings might have been made and passed between the parties, both before and after the commencement of the action, mentioning the premises in question and matters in dispute, and yet neither expressly nor impliedly admitting or denying the fact of a partition of the property having been made, which is the great point in issue here: but unless they tended to establish the affirmative or negative of this fact, it is not easy to conceive how they could have been relevant. It is also alleged that as the defendant made no objection to the plaintiff's reading in evidence those documents which were rejected by the court, the court had no right to prevent the plaintiff from doing so after having permitted the defendant to give testimony of somewhat similar character. This surely cannot be a sufficient reason to justify the court in consuming time unnecessarily with the trial of a cause, thereby subjecting the county to additional and unnecessary expense, as well as delaying the trial of other causes, which is a still greater evil. It is doubtless the bounden duty of the court, as soon, and as often as it shall discover clearly that evidence which is about to be given on the trial of a cause, no matter at what stage of it, is irrelevant and has no bearing whatever upon the issue, to

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interfere and reject it. And as it does not appear here that the testimony rejected could have been in any respect material to the issue, we cannot say that the court erred in refusing to receive it.

Eleven other errors have been assigned, consisting of exceptions to the charge of the court to the jury. They however all relate to the opinion of the court on the effect of the award of the arbitrators made on the 17th of February, 1830, and [*432] an examination into the *nature of this award, and the correctness of the opinion of the court below in respect to it, will dispose of the main question in the cause, and render a particular notice of these eleven errors in detail unnecessary. His honour the judge below told the jury: "My opinion is that on the agreement of the 8th of June, 1827, the documents and general conduct of the parties, these gentlemen (the arbitrators) had jurisdiction to do what they did, to make the award that this partition by Michael Baker should be carried into effect." And again he repeats to them, "My opinion is, that this matter, whether the partition made by Michael Baker was valid or not, was within the jurisdiction of the referees, and their decision is binding and conclusive between the parties. My opinion is founded on the award, and that it is binding and conclusive." And in the conclusion he adds, "For the matter of the award, on which I have fully charged, is sufficient to enable you to make up a verdict, which I advise you to find for the defendant."

The submission of the 8th of June, 1827, to Charles Chauncy and Horace Binney, Esquires, being of all matters in variance between the parties, and having been reduced to writing and signed by them, would doubtless have been sufficient, had the partition of the property in question been then one of the matters in variance, to have authorized these gentlemen to have awarded a partition of it, and to have directed in what manner it should be executed; for the terms of the submission are sufficiently comprehensive to embrace any matter then in dispute between the parties in respect to real, as well as personal estate. *Marks v. Marriot*, 1 *Ld. Raym.* 114; *Munro v. Alaire*, 2 *Caine's Rep.* 327; *Sellick v. Adams*, 15 *Johnson's Rep.* 199; *Byers v. Van Deuson*, 5 *Wend.* 268. But the arbitrators by their award of the 17th of February, 1830, have not directed a partition of the property to be made in any particular manner. Their award is in these words, "We are of opinion and do award that the partition of the High street and Seventh street property, agreed between you according to the plan of Michael Baker, shall be carried into effect." It is obvious from the terms of the award, that the gentlemen arbitrators,

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did not consider it as submitted to them to decide and direct in what manner, and in what proportions the partition of the property should be made between the parties, but merely to determine as they stated in their note to Mr. Hyman Gratz of the 12th of May, 1830, whether an agreement made by the parties in the presence of the arbitrators, as they allege, in regard to the partition of the property, should be carried into effect or not. But as this agreement upon which the arbitrators acted, and which is made the foundation of the defendant's defence, is admitted by him to have been made as late as the 12th of February, 1830, long after the submission of the 8th of June, 1827, it or any matter in variance growing out of it between the parties, could not of course have been embraced within that submission. The written instructions given to Mr. Baker, under which he made out his plan of the property that is *referred to in the award were not delivered to him before the 10th of February, 1830, and on the second day [*433] following that, he reported his plan, distinguishing it by six Nos. or parcels, and dividing the whole into three allotments. Hence it is evident that the subject-matter of the award of the 17th of February, 1830, was not within the submission of the 8th of June, 1827, and if there were no other submission agreed on between the parties embracing it, this award would clearly be void for want of authority on the part of the arbitrators to make it. Plowd. 396; Dyer, 242; 1 Bac. Abr. tit. Arbitrament & Award, [E.] page 213; Huff v. Parker, cited 4 Dall. 285; 3 Yeates, 567; Gurman v. Hill, Aleyn, 26; Hooper v. Pierce, 12 Mod. 116; Anon. Ib. 8. The submission of the 8th of June, 1827, being the only one that is pretended to have been in writing, and to have been signed by the parties, it necessarily follows, that if any submission were made, embracing the dispute between the parties in respect to the agreement said to have been made, by which they agreed to make a partition of the property in a particular way, according to a plan of Michael Baker, it must have been merely verbal. This agreement if made, was also verbal, and seems to have been denied by Hyman Gratz, in all his written communications anterior to the making of the award. In his communication to Simon Gratz, on the 15th of February, 1830, he mentions it as a division proposed, not agreed on, and as it would not make an equitable or equal division of the property according to its value, he therefore declines entering into the arrangement. And again, in his written communication read to the arbitrators on the 17th of February, 1830, the same date of the award, after stating to those gentlemen that they had been called together by Simon Gratz, as he conjectured, to make some order for the deeds, in

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case they (the parties) had agreed on the division of the property, he says, "We have not agreed, nor can we agree; my note to Simon informed him of this." This agreement for partition, however clearly and satisfactorily it might be established, being verbal and never reduced to writing, comes within the act of assembly against frauds and perjuries, and cannot pass the right which the one party had at the time of the agreement of division, to the other, in that part of the property, which by the agreement was allotted to be held in severalty by the latter. It has however been contended, that there was such a partial execution at least of this agreement of partition, as was sufficient to take it out of the act against frauds. If this be so, there was certainly no evidence given of it on the trial of the cause. The acts of Hyman Gratz in employing and giving instructions to the scrivener to draw a deed of partition or other writings, deemed necessary for carrying the partition into effect, and in going upon the property with an artist, and measuring off and designating the lines of division according to the agreement, for the purpose of enabling the scrivener to draw the writings, and to describe the several allotments with precision and accuracy, cannot be considered of a character sufficient to take the [*434] *case out of the act against frauds. They were at most only preparatory to the execution or performance of the agreement for partition. Neither could Simon Gratz without the assent of Hyman Gratz, divest Hyman of his right to the property as a tenant in common with Simon, by his withdrawing from the possession of that part of it, which by the agreement, had it been carried into execution, would have fallen to Hyman, and at the same time declaring, that he took the exclusive possession of the residue, which he then had, and that he intended to hold it in severalty according to the agreement of partition, which he alleged was made between them. The assent of Hyman to the execution of the agreement, was just as necessary in order to render it effectual, as it was to the making of it to give it validity.

It has also been further contended, that as Simon Gratz has the legal title exclusively in himself to almost the whole of the property, and the right on the part of Hyman is merely equitable, being a trust resulting by operation of law, from the circumstance of its having been purchased by Simon with the partnership funds of himself and Hyman, he owning two-thirds and Hyman one-third thereof, Hyman has no such right or interest in the property as makes it necessary under the statute or act against frauds, to have an agreement in writing signed by him in order to render the partition effectual, and to transfer his right in that part of the property to Simon, which according to

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the agreement was to be Simon's share of it. The terms of the act against frauds I think are sufficient to embrace equitable interests in lands as well as legal. The words are "all leases, estates, interests of freehold, or term for years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements, or hereditaments, made or created by livery and seizin only, or by parol and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not either in law or equity be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates, or any former law or usage to the contrary notwithstanding; except, nevertheless, all leases not exceeding the term of three years, from the making thereof: and moreover, no leases, estates, or interests either of freehold or term of years, or any uncertain interest of, in, to, or out of any messuages, manors, lands, tenements, or hereditaments shall at any time be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting, or surrendering the same, or their agents thereunto lawfully authorized by writing, or act or operation of law." The term "interests" being used here without any other words to qualify or restrain its general and most extensive signification, I am unable to discover any good reason why it should not be considered and held to extend to equitable interests in lands as well as legal. The equitable owner of lands lying in this *state is generally deemed to all intents and pur- [*435] poses the legal owner of them, even as against the trustee himself, except in those cases where for the purpose of executing the trust, it may be necessary for the trustee to have possession and control of the estate. As well might it be said that equitable interests or estates in land within the states are not embraced by our acts of assembly providing for the recording of deeds and conveyances made of and concerning them; and that the first vendee of an equitable estate in land for a valuable consideration, shall be preferred to a subsequent *bona fide* purchaser for a valuable consideration without notice, whether the first vendee have put his deed on record or not within the time prescribed by the act; for the rule on this subject, setting aside our recording acts, would be *qui prior est in tempore, potior est in jure*.

The late Mr. Justice Duncan, in Wither's Appeal, 14 Serg. & Rawle, 193, says, "although the seventh section of the statute of frauds (meaning the English statute) which enacts that all the declarations or confessions of trust or confidence of any

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lands, &c., shall be manifested and proved by some writing, is not incorporated into our law, yet in substance it is comprehended in the first section of the act;" and then he recites what he considered the true reading of that section thus, "no interest in land, either in law or equity, shall pass by parol only, any consideration for making the agreement to the contrary notwithstanding, except for a term not exceeding three years, nor except by deed or note in writing signed by the party, or by the act and operation of law." It is under the last clause and exception of this section which I have recited literally above, that Hyman Gratz became invested with his right to the property, and would be permitted to show it by parol evidence in case it were denied. It arose and was created by the operation of the law upon the act of Simon Gratz in his employing the joint funds of himself and Hyman to pay for the property, and in taking the deed of conveyance for it, in his own name alone. It is, however, admitted, or at least not denied by the counsel for the defendant, that an agreement, in order to make it effectual, and pass the right or interest of the defendant in any part of the property in dispute, must be in writing and signed by him, otherwise it would come within the act of frauds. Then I apprehend that unless the agreement of partition were sufficient to pass Simon's interest to Hyman in that part of the property, which by the division agreed on was to belong thereafter to him in severalty, it would be equally insufficient to transfer Hyman's interest to Simon in that portion of the property, which by the agreement of partition was allotted to him; for it is a rule particularly applicable to agreements, where mutuality of concessions between the parties, from the whole and only consideration for making them, that there must be a complete reciprocity of obligation, benefit, and effect arising from the agreement, according to the full extent of the intention of the parties, otherwise it will not be binding on either. Indeed it is manifest, that unless this were so, one of the

[*436] *parties would often part with his right without receiving the *quid pro quo* intended, and expressly mentioned to be given him by the terms of the agreement. It is still further argued, that as the binding efficacy of this agreement of partition, which is said to have been made, was submitted by mutual agreement of the parties to arbitrators as judges of their own choosing, who, in deciding between them, were not tied down by the strict rules of law, and as these judges have decided that the partition of the property agreed between the parties according to the plan of Michael Baker, shall be carried into effect, they are both concluded by this judgment or award of the arbitrators, and cannot after it inter-

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pose the statute of frauds, or anything else, to defeat the specific execution of the agreement for partition. This argument, it may be observed, is predicated upon the assumption that this matter, upon which the arbitrators awarded, was submitted to them by the agreement of the parties, a fact which seems to be denied by the plaintiff, and therefore ought to have been left to the decision of the jury by the court below. The court, however, conceived that it was embraced within the submission of the eighth of June, 1827, which was admitted by both parties to have been made, but did not, and in the very nature of things as I have already shown, could not have embraced this matter. The judge below, therefore, misdirected the jury in this particular. If there were no submission of this matter to the arbitrators, upon which they awarded, the award of course would be an absolute nullity, but if there was a submission of it, it must have been a verbal agreement of submission, as it is admitted that there never was a submission in writing, and signed by the parties, except the one of the eighth of June, 1827, which was altered in some respects on the fourteenth of May, 1828. Now, as a submission is in the nature of an authority granted to the arbitrators, can that authority be deemed sufficient to authorize them to dispose of the interest of the parties, or of either of them, in real estate, consistently with the act against frauds, unless that authority, or in other words, the submission, be in writing? The words of the act, as we have already seen, are that no interests in lands shall at any time be assigned, granted, or surrendered, unless it be by deed or note in writing, signed by the party assigning, &c., or their agents, thereto lawfully authorized by writing, or by act and operation of law. It cannot be pretended that the act of the arbitrators is the act of the law, and therefore taken out of the general provisions of the act by the exception contained in the last clause of the section. Arbitrators act entirely under the authority, in such cases, that is given to them by the parties in the terms of the submission. Without this they cannot act at all; and if they do any act not authorized by the terms of the submission, it is clearly void. Under this view of the act against frauds, I think that the arbitrators without a submission in writing from the parties, could neither make a partition of the property between the parties, nor yet award a partition of it to be made, so as to pass the interest of each party to the other in his respective share, as is done in partition by operation of law, or [*437] by act of the parties in executing mutual releases, or so as to conclude the parties from asserting their former rights and manner of holding the land. The award of the arbitrators made under a verbal submission, cannot, therefore, it appears to me,

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be of greater force and efficacy, than a verbal agreement fairly made between the parties of the same purport. If one of the parties should refuse to comply with it, it may be a good cause for a suit, and that perhaps is the most that the other party can have for any actual loss sustained by a non-performance. But taking it to be true that the award in this case was made under a submission mutually agreed to between the parties, it is not such an award as either party could maintain an action against the other on account of his not having complied with it.

In 1 Bac. Abr. tit. Arbitrament and Award, [E,] page 212, 13, it is laid down, that "as an award is a judgment, and can only be expounded by itself, without the aid of an averment of matter *dehors* to explain the meaning of the arbitrators, it is necessary that it should appear on the face of it." This principle is also sustained in Dyer, 242, b. And in Bac. again, at page 218 it is repeated, that an award is in the nature of a judgment, it ought to be wholly decisive; for if it doth not determine the matter, it becomes the cause of a new controversy; therefore, if the arbitrators award a bond for quiet enjoyment of lands, without appointing a certain sum, this is a void award, and the party is not obliged to give bond to the value of the land, as he would be in case he had made a covenant to enter into such a bond, for then the sense of the award must be supplied by averment. Samon's Case, 5 Co. 78; s. c. Cro. Eliz. 432. So if the arbitrators award that one party shall give security to the other for the payment of sixteen pounds, this is not a good award, because it does not appear what security, whether bond or otherwise. Thinne v. Rigby, Cro. Jac. 314; s. c. Jenk. 340; Tipping v. Smith, 2 Strang. 1024. And although awards are now considered with greater latitude and less strictness than they were formerly, yet it is still indispensably necessary that they should appear upon their face to be final and certain. This certainly may be judged of according to a common intent, and such as is consistent with fair and probable presumption. Hawkins v. Colclough, 1 Burr. 277. The award in the present case appears to be defective in regard to certainty. It directs, "that the partition of the High street and Seventh street property agreed between the parties according to the plan of Michael Baker shall be carried into effect." The description of the property seems to be entirely too vague and uncertain, unless the reference to Mr. Baker's plan should help it, which possibly may be the case. This, however, is not the principal feature of uncertainty in it; for the partition is directed to be made in conformity to this plan of Mr. Baker, and according to an agreement made between the parties, which agreement is not found or set out by the arbitrators. The plain-

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tiff denies that he ever made *any agreement of partition; and without it were in writing and referred to or [*438] recited in the award, so that it could be identified; or the arbitrators had reported what the terms of the agreement were, by incorporating the whole of it into their award, how is it possible to say in what manner the partition awarded by them was intended to be made? It does not appear in what proportions the property was intended to be divided and allotted to the parties respectively, whether an equal moiety of it to each, or two-thirds thereof to one, and one-third to the other; or whether in either of these proportions, is altogether uncertain, and cannot be ascertained except by averments and the introduction of parol evidence, which is not at all admissible. Neither is it possible to discover from the award what the property consisted of, and what part of it the plaintiff or defendant was to have for his share. It contains no instructions that are intelligible, for making a partition, unless to the arbitrators and the parties themselves. If a partition were to be made of the property, it might be difficult, if not impossible, to decide whether it was in conformity to the award or not. No doubt the arbitrators put enough on paper at the time to make themselves perfectly well understood by the parties, who, had they both been disposed to comply with the award, would probably have found no difficulty in making the partition, on account of not understanding and knowing fully what it was that the arbitrators intended each should do, in order to carry the partition into effect. It is evident to me that the arbitrators did not intend that any particular division of the property directed by them should be enforced further than the parties themselves should carry the same into effect from principles of honour, otherwise an award unexceptionably good, in form, at least, would have been made, as gentlemen more competent for such purpose could not have been found. But then, it must be observed, that it is not barely sufficient in order to make an award good, that the parties, as well as the arbitrators, should understand what was meant and intended by it, at the time of making it. It ought to be in such clear and intelligible terms, that every one who reads it may comprehend and understand it. The arbitrators cannot be called on, nor will they be admitted to declare and explain what it was, that they intended by their award. Their meaning must be collected from the face of the award itself; except "when the words of the award have relation to things certain out of the award, these may be averred, for that is the express mind of the arbitrators, which they have expressly referred to" 1 Bac. Abr. tit. Arbitrament and Award, 218-19. As where an award was made that J. should permit B. to enjoy certain leases of

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lands purchased from J. S. and that B. should pay the rents and perform the covenants and deliver to A. a true copy of the leases and pay the arrears to the time of the purchase from J. S., it was held a good award as to the rents and covenants, though not particularly specified; because by a reference to the leases which were in writing, and therefore certain, the minds of the arbitrators would be found to be as clearly and intelligibly *expressed, as if they had repeated the same in their [*439] award; but as to the arrears of the rent, which could not be ascertained without recourse to parol evidence, the award was held to be void for uncertainty. *Massey v. Aubry*, Style, 365. So the agreement for partition of the property referred to in the award in this case, not being in writing, is altogether uncertain in respect to its terms and conditions, if not its existence, and could only be ascertained by means of parol evidence and a jury, who would have to determine on its import, and the intention of the parties in making it, as a matter of fact; and whether they would put the same construction on the intention of the parties in making such contract, as the arbitrators did, may be very doubtful, and thus, in effect, the most material and important part of the award, would be referred to a jury for its interpretation, instead of the court, which is certainly the proper tribunal to give a construction to awards that are in writing. In the case of *Bedam v. Clerkson*, 1 Ld. Raym. 123, an award to deliver up a certain writing obligatory without specifying the date or penalty, was adjudged void for uncertainty. Also in *Pope v. Brett*, 2 Saund. 292, 295, an award that A. should be paid and satisfied by B. the money due and payable to him for work, and that A. should pay twenty-five pounds to B., and that each of the parties should give the other a general release, was held to be void on account of the uncertainty as to the sum that was due for the work. In this last case, doubtless the money awarded to be paid to A. for his work, was due to him under an agreement made with B., but still it would not have helped the award, if the arbitrators had directed the money that was due to A. by B. for work, to be paid according to their agreement, which would have made the case similar, even in terms, to the case under consideration. In *Schuyler v. Van Der Veer*, 2 Caine's Rep. 235, it was held, that an award "to finish the house" and "to pay for the stone," without saying what house or what stone, was void for uncertainty. I will refer also to the case of *Johnson v. Wilson*, Willes's Rep. 248, without saying that I should feel myself bound by it, were the same question to come before me for determination, but it being a late case, I cite it to show what has been adjudged necessary in order to make an award good

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for the partition of real estate. The arbitrators in the case divided and allotted the whole of the estate in severalty among the parties, which had been previously held by them as tenants in common, but did not direct any deeds of conveyance to be executed to vest the allotments in the respective owners, and for this defect the award was held to be void.

To supply such deficiencies in awards by averments, and the introduction of parol evidence is so contrary to the established rule, as never to be thought of at the present day, and to do so indeed would overturn the whole doctrine as it regards awards in this respect. Besides, as the defendant in this case claims from the award the effect of a partition of real estate, the introduction of parol evidence to show the terms and the extent of the verbal agreement between the parties *referred [*440] to in the award, in order again to extend the meaning and operation of the award, would militate against the express provisions of the act against frauds and perjuries, and upon this ground I also conceive it inadmissible.

Having shown that the award for carrying a partition of the property in dispute into effect is void; it can present no objection whatever either in a legal or an equitable point of view, to the claim on the part of the plaintiff to have partition made of it. Neither can the circumstances of Simon's having mortgaged the whole of the property, he having the legal title to it in himself, and having bound himself at the same time by his bonds, for the payments of debts owing by him and Hyman jointly, be any objection to the property's being divided before Hyman shall pay his proportion of these debts: for in making the partition both parties will take their respective allotments, charged with, and subject to the payment of them. Each will still have to pay his proper proportion, so that neither can gain or lose by making partition of the property on this account.

The judgment is reversed and a *venire facias de novo* awarded.

Cited by Counsel, 1 Wh. 519; 5 Wh. 105; 2 Wh. 466; 9 W. 107; 1 W. & S. 319; 4 W. & S. 485; 9 C. 377; 11 C. 411; 12 S. 137; 20 S. 198; 11 W. N. C. 84.

Cited by the court, 9 Wr. 192; 1 Par. 96; 14 W. N. C. 317.

[PHILADELPHIA, FEBRUARY 21, 1834.]

Hellman for the Use of Miltenberger, Trustee of Hellman, *against* Hellman and Others.

IN ERROR.

A release of a pecuniary legacy charged upon land, not executed before at least two competent subscribing witnesses, is not within the provisions of the act of 15th of April, 1828; and therefore a certified copy of it from the recorder of the county, is not admissible in evidence under that act.

A release of such a legacy is not such a deed, conveyance or writing, as passes or creates any right or interest in or to the land on which it is charged, and consequently is not embraced by any of the acts of assembly, provided for the recording of deeds and conveyances or other writings, made of and concerning lands lying within this state.

It seems, that under the act of the 18th of March, 1775, conveyances, although not under the hands and seals of the parties respectively executing the same, "of or concerning any lands, &c., or whereby the same may be in any way affected in law or equity," may be recorded, after having been proved or acknowledged in the manner prescribed by law, and exemplifications of them read in evidence.

The lien of a legacy charged upon land is discharged by a judicial sale of the land, though the legacy is payable by instalments, some of which are not due at the time of the sale.

Where a release of a legacy charged upon land has been given in evidence, the record of a judgment on a bond given by the devisee of the land to the legatee, which from the declaration appears to have been of the same date as the release, is competent evidence, in an action brought to recover the amount of the legacy, to show, not only the fact that the judgment was had, but also its amount, and the consideration or cause of action, for which it was rendered.

The sheriff has no right, power, or authority to sell land subject to one lien and discharged from another, without the consent of all the parties concerned.

Where a legacy is charged upon land and payable by instalments, and the testator in a subsequent clause of his will declares that it is his will and desire that the legatee "shall receive no principal, but receive the interest as it becomes due," the whole legacy is vested and the legatee may release it to the devisee of the land.

[*441] *ON the return of a writ of error to the Court of Common Pleas of *Northampton* county, it appeared from the record, that this suit was brought by John Hellman, who sued for the use of his trustee, Nicholas Miltenberger, against Abraham Hellman and Daniel Rohn, executors of Christian Hellman, deceased, Abraham Hellman, devisee of the lands and tenements whereof the said Christian Hellman died seized in his demesne as of fee, and J. C. Becker, tenant of the said lands and tenements, to recover the amount of a legacy charged upon the testator's real estate in favour of the plaintiff.

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By the will, which bore date the 6th of April, 1815, and was proved on the 12th of the same month, the testator, after making some specific bequests of goods, &c., to his widow, directed as to her, "and further to receive during her life, out of the estate, the interest of three hundred pounds per annum, as long as she remains a widow; likewise to have privilege to remain in this house which I now occupy, during life; further, my son Abraham to haul wood, and cut it at the house, as much as she has need for."

The will then proceeded thus:

"And further, it is my will and bequest, that my son Abraham have the whole of my real estate, with the choice of two horses, one colt, wagon, plough, harrow, wind-mill, harness for three horses, one sleigh, one dung hook, two forks, one hay fork, out of which property the said Abraham to pay to my other children as follows, to wit: to my son John, my daughter Catharine Rohn, Magdalene Rohn, Elizabeth Kressler, and Rachel Miltenberger, each and every of them as follows:—Catharine, wife of Daniel Rohn, one hundred dollars one year after my death; Magdalene, wife of Casper Rohn, one (hundred) dollars two years after my death; John Hellman, one hundred dollars three years after (my) death; Elizabeth Kressler, one hundred dollars four years after my death; Rachel, wife of Nicholas Miltenberger, five years, one hundred dollars; the above payments to be yearly paid till they amount to one thousand pounds, to be paid to the above-mentioned legatees—three hundred pounds to be deducted at the death of my beloved wife. It is further my will and desire that my son John receives no principal, but receive the interest as it becomes due," &c.

It was conceded, that Rosina Hellman, the widow of the testator, died on the 6th of September, 1828.

After the plaintiff had given in evidence the record of the Court of Common Pleas of Northampton county, from which it appeared that on the 21st of November, 1829, on the petition of John Hellman, the court appointed Nicholas Miltenberger his trustee, his counsel stated his claims to be for one hundred dollars, due the 6th of April, 1818, one hundred dollars due the 6th of April, 1823, one hundred dollars due the 6th of April, 1828, and one hundred and sixty dollars due the 6th of September, 1828, the time of the widow's death, with interest from the times those respective sums fell due, and rested his case.

*The defence set up by Becker, the terre tenant, was, [*442] that there was no legal plaintiff on the record, the Court of Common Pleas having no power to appoint a trustee in a case like this: That John Hellman, the legatee, had on the

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15th of May, 1815, released all claim on the estate, on account of his legacy, in consideration of the sum of three hundred and seventy-five pounds, acknowledged to have been paid, which release had been put on record, and was notice to all the world: That the sheriff had subsequently sold to the defendant Becker, the land devised to Abraham Hellman under execution against him by which the lien of the legacy was divested, and that one of the bonds given to John Hellman, when the release was executed, was the foundation of a judgment to the payment of which part of the purchase-money was applied.

In support of the defence thus set up, the defendant's counsel offered in evidence, an exemplified copy of a release from John Hellman to Abraham Hellman, dated the 15th of May, 1815, to the admission of which the plaintiff's counsel objected, but the court overruled the objection, and their decision on this point was the subject of the first bill of exceptions.

The defendant then offered in evidence the record of a judgment in a suit brought by Nicholas Miltenberger against Abraham Hellman; the executions issued upon that judgment; the sale by the sheriff under those executions, and a deed from the sheriff to J. C. Becker, dated the 25th of January, 1823. This evidence was objected to by the plaintiff's counsel, because it was irrelevant to the issue trying, and did not divest the lien of the legacy.

The court however permitted the evidence to be given and a second bill of exceptions was tendered and sealed.

The subject of a third bill of exceptions was the rejection by the court of the record of a judgment in a suit brought to April Term, 1819, by John Hellman to the use of Daniel Rohn against Abraham Hellman on a bond for two hundred dollars, which appeared from the declaration to be of the same date as the release already referred to. It was objected to by the plaintiff's counsel as irrelevant to the issue, and inadmissible under the pleadings in the cause; but the court overruled the objection.

The defendant after having given other evidence which is not now material, examined several witnesses who proved that John Hellman had no property except what he got from his father's estate: That he was addicted to liquor, but was sometimes sober for a week or two, and that when sober he was capable of taking care of his affairs: That he was always fond of liquor, and was then more addicted to it than he used to be.

After the defendant had closed his evidence, the plaintiff gave in evidence three bonds, dated the 15th of May, 1815, from Abraham Hellman to John Hellman for the payment of fifty pounds, one of them payable the 15th of April, 1828, the second payable the 15th of April, 1829, and the third

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payable the 15th of April, *1830. He also gave in evidence the conditions of the sheriff's sale which took [*443] place on the 4th of January, 1823, at which Becker became the purchaser, which were as follows:

"First—The highest and best bidder shall be the buyer.

"Second—The purchase-money shall be paid on or before the third Monday of January instant, at which time a deed will be executed by the sheriff.

"Third—If the purchaser fail to pay the purchase-money at the time above stated he shall be liable for any loss at a subsequent sale, and shall not be entitled to any advantage should an additional price be given at such subsequent sale for the said premises.

"Fourth—The purchase-money shall be applied to the payment of liens by mortgage and judgment, according to priority."

When the evidence on both sides was closed, the plaintiff's counsel requested the court to charge the jury on the following points of law:

"1. The legacy was a charge on the land, and the sheriff's sale under the conditions on which the property was sold, did not divest the lien.

"2. That John Hellman was incompetent to release the legacy given by the will of Christian Hellman, deceased, more especially as Abraham Hellman was one of the executors, and bound to guard the interests of the legatees."

In answer to the first point proposed by the plaintiff's counsel, the court charged the jury, that "the sheriff's vendee took the land discharged of the lien of the legacy, unless it was sold subject to the lien; and in the opinion of the court there is no exception as to this lien in the condition of sale."

In answer to the second point, the court charged the jury, that "John Hellman had a right to receive what his father had left to him, and he had a right to discharge his interest under the will in this case, if he was capable of managing his affairs."

To this opinion the counsel for the plaintiff excepted, and requested that it might be filed, which was done accordingly.

The errors assigned in this court were:

1. The admission in evidence of the copy of the record of the release, John Hellman to Abraham Hellman, dated the 15th of May, 1815.

2. The admission in evidence of the record of the suit, judgment, executions, and sheriff's sale mentioned in the second bill of exceptions.

3. The admission in evidence of the record of the suit and judgment mentioned in the third bill of exceptions.

4. The court erred in their charge to the jury in not affirm-

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ing the first point propounded, and in what was said in answer to said point.

5. The court erred in charging the jury in answer to the second point propounded, that John Hellman had a right to receive what his father had left him, and had a right to discharge his interest under the will in this case, if he was capable of managing his affairs.

[*444] *6. That the court did not fully and distinctly answer the points propounded.

J. M. Porter, for the plaintiff in error, referred to the acts of the 15th of April, 1828, *Purd. Dig.* 207, of the 28th of May, 1715, *Purd. Dig.* 195; and of the 18th of March, 1775, *Purd. Dig.* 198; *Sharp v. Sharp*, 13 *Serg. & Rawle*, 444; *Barnet v. Washenbaugh*, 16 *Serg. & Rawle*, 410; *M'Lanahan v. Wyant*, 1 *Penn. R.* 112; *Shultze v. Diehl*, 2 *Penn. R.* 277; *The Comm. v. Alexander*, 14 *Serg. & Rawle*, 257; *Fickes v. Ersick*, 2 *Rawle*, 166; *Ripple v. Ripple*, 1 *Rawle*, 386; *Duncan v. Reiffe*, 3 *Penn. R.* 368; *Anwerter v. Mathiot*, 9 *Serg. & Rawle*, 397; *Weidler v. The Farmers' Bank of Lancaster*, 11 *Serg. & Rawle*, 134; *Roper on Leg. Ch.* 21, sec. 313, page 311; *Pidcock v. Bye*, 3 *Rawle*, 183; *Sparks v. Guarrigues*, 1 *Binn.* 152.

Jones, for the defendant in error, cited *Thomas v. Thomas*, 1 *Rawle*, 120, 121; 1 *Roper on Leg.* 340, 343, 344; Act of the 22d of March, 1825, *Purd. Dig.* 858; Act of the 14th of April, 1828, *Purd. Dig.* 859; *Kelly v. Dunlap*, 3 *Penn. R.* 137; *Lapatee v. Pecholier*, 2 *Wash. C. C. R.* 180; *Whart. Dig.* 597.

The opinion of the court was delivered by

KENNEDY, J.—The first error in this case is an exception to the opinion of the court in which it was tried, admitting the defendants to read in evidence to the jury a certified copy from the recorder of the county, of a release purporting to have been executed and given by John Hellman, the plaintiff, to Abraham Hellman, one of the defendants, for the legacy, to recover a part of which this suit was brought.

The release of which the certified copy was given in evidence, appearing from the face of the copy not to "have been executed before at least two competent subscribing witnesses," is clearly not within the provisions of the act of assembly of the 15th of April, 1828, and therefore the certified copy of it from the recorder of the county was not admissible in evidence under that act. But it has been contended that it is embraced by the pre-

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vious acts of assembly, providing for the recording of deeds and conveyances, or writings made of and concerning lands lying within the state. The act of 1715, which is the first on the subject, declares that "all bargains and sales, deeds and conveyances of lands, tenements, and hereditaments, in this province may be recorded," &c., after having been acknowledged or proved in the manner therein prescribed. The act of 1775 directs the recording of "all deeds and conveyances, which from and after the publication thereof shall be made and executed within this province of or concerning any lands, tenements, or hereditaments in this province, or whereby the same may be any way affected in law or equity." And by the sixth section of this act, the recorder is directed to make an entry in a book which he is required to keep for that purpose, "of every deed or writing brought into his office to be *recorded," showing here by the use of the term "writing," as I [*445] apprehend, that it was not intended to confine or restrict the meaning of the term "conveyances" used in the first section, which I have recited in part, to deeds, so that conveyances, although not made under the hands and seals of the parties respectively executing the same, "of or concerning any lands, &c., or whereby the same may be any way affected in law or equity," may be recorded after having been proven or acknowledged in the manner prescribed by any of the various acts providing therefor, and copies thereof certified under the seal of the recorder's office, according to the fifth section of the act of 1715, "shall be allowed in all courts where produced, and are thereby declared and enacted to be as good evidence, and as valid and effectual in law as the original," &c. Besides it is the more reasonable to give this construction to this act, making it embrace writings not under seal as well as those that are; for only three years before the legislature passed the act against frauds and perjuries, which makes a writing signed by the party though not under his seal, sufficient to pass his interest in lands. From these acts of the legislature taken collectively, I think it is pretty evident that the "deeds and conveyances, or writings" therein mentioned and authorized to be recorded, must be understood to mean such as pass or create an interest or right of some kind in land, unless indeed it be mortgages, which are expressly mentioned in other parts of the act of 1715. But a release or an assignment of a mortgage I do not consider as embraced. This presents then the question, is a release of a pecuniary legacy charged upon land, such a deed, conveyance, or writing as passes or creates any right or interest in or to the land upon which it is charged? It does not consist of land, nor call for it; it is a certain amount of money, and cannot without

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consent or agreement be paid or satisfied in anything but money. It is to be sure charged upon land in this case, which was devised by the testator to Abraham Hellman, one of the defendants, whom he directed to pay the legacy in question. It is therefore only at most a lien upon the lands. Now a lien even upon personal property is said to be neither a *jus ad rem* nor *jus in re* although it gives the party a right of retaining the goods until his demand shall be paid. *Meany v. Head*, 1 Mason's Cir. Court Rep. 319. If this proposition be true in respect to goods, as no doubt it is, its truth as to lands is still much more apparent, where it does not even give a right to hold or retain the possession of them. No one ever supposed that the release of a judgment which was a lien upon the land of the releasee, or that the receipt of the plaintiff therein given to the defendant for the payment of it came within either the letter or meaning of our recording acts; yet the legatee has no more right to, or interest in the land upon which his legacy is charged, than the plaintiff in the judgment has to or in the lands of the defendant bound by it. And that such had ever been the universal understanding of the meaning of the recording acts until the 15th of April, 1828, when the legislature [*446] passed the act already *mentioned, is shown very clearly by the terms of it. This act directs that "any release or other instrument in writing being evidence of the payment or satisfaction of any legacy charged upon lands, tenements, or hereditaments, and also any release or other instrument in writing, given to any executor, administrator, assignee, trustee, or guardian, whether relating to real or personal estate, if such release or other instrument in writing shall be under seal, and shall have been executed before at least two competent subscribing witnesses, and shall also have been acknowledged, or the execution thereof proved, in the manner provided by the existing laws for the acknowledgment or proof of the execution of deeds and conveyances of lands, tenements, and hereditaments, in order to authorize the same to be recorded, may in case of such release or other instrument in writing, relate to real estate, be recorded in the office for recording of deeds in the county where such real estate may be situate, &c., and copies or exemplifications of such releases or other instruments in writing under seal, acknowledged or proved and recorded as aforesaid, being examined by the recorder, and certified under the seal of the proper office, which the recorder or keeper thereof is thereby required to do, shall be allowed as well in all courts where produced as elsewhere, and are thereby declared and enacted to be as good evidence, and as valid and effectual in law as the original releases, or other instruments in

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writing under seal would be, if duly proved by the subscribing witnesses thereto, and the same may be shown, pleaded, and made use of accordingly." The passage of this act so far as it relates to the releases of legacies charged upon lands, would have been unnecessary had they been included in the recording acts passed previously ; and had it been then understood that they were embraced, they would no doubt have been omitted. Seeing that the copy of the release given in evidence in this case, is not embraced and provided for by any of our recording acts, it is manifest that it was not admissible in evidence upon any principle of the common law. The court were therefore wrong in receiving it.

The second error is an exception to the opinion of the court, in admitting to be read in evidence the record of a judgment and the proceedings thereon at the suit of Nicholas Miltenberger against Abraham Hellman, one of the defendants in this case, and the devisee of the land charged with the legacy in question, showing that the land had been taken in execution and sold as his property by the sheriff, in the month of January, 1823.

That this judgment, and the proceedings under it, including the sheriff's sale of the land charged with the payment of the legacy in this case, were admissible and competent evidence, cannot, according to the doctrine laid down and established by this court in *Barnet v. Washebaugh*, 16 Serg. & Rawle, 410, and *M'Lanahan v. Wyant*, 1 Penn. Rep. 95, be doubted ; and ought not now to be questioned. It was evidence of the highest character to show that there had been a judicial sale of the land, and therefore not liable to the objection that [*447] *it was not the best evidence that the nature of the thing admitted of ; and in the next place, according to the cases cited, went to show that the land was thereby discharged of the legacy, and therefore not liable for the payment of it in the hands of J. C. Becker, one of the defendants in this case and the purchaser at the sheriff's sale ; which proves the pertinency and the important bearing of it upon the issue as respected Becker. It is said that the legacy in this case had not become payable at the time the land was sold by the sheriff, and therefore it was unlike to the cases cited. One hundred dollars however of it, according to the plaintiff's own statement of the case, had become so, and another hundred dollars within a few days of it, so that as to one hundred dollars of the plaintiff's claim, there is not even the shadow of a difference, which is sufficient to make the evidence competent and admissible. But it appears to me, that the whole of the legacy charged upon the land in this case, falls within the principle decided in the cases of Bar-

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net *v. Washebaugh*, and *M'Lanahan v. Wyant*. By the terms of the will, I consider it in effect a bequest of two hundred pounds to John Hellman to be paid to him by Abraham Hellman, the devisee in fee of the land, in instalments of one hundred dollars each; the first instalment to be paid in three years after the death of the testator, and the like sum of one hundred dollars every five years thereafter, until the whole of the two hundred pounds should be paid. It is not like the case of an annuity, or rent charged upon land during the life of the party, or for any other indefinite period, which has been spoken of, and about which I give no opinion. The amount of the bequest in this case is certain, and the times of payment become fixed immediately upon the death of the testator. The amount or value of the legacy was therefore capable of being reduced to a sum certain at any intermediate time before it became payable, that a judicial sale might happen to be made of the land. It is evident from the face of the will, that the remoteness of the times fixed thereby for the payment of the legacy, was done for the accommodation and benefit of the devisee of the land, who was to pay it; and that it was made a charge upon the land, for the better security and advantage of the legatee. I can perceive no essential difference between the legacy charged in this case upon the land, and the case of a judgment bond, had it been given by Abraham Hellman and been entered up against him, so as to become a lien upon his land, by which he had bound himself to pay to John Hellman one hundred dollars on the 1st of April, 1818, and the further sum of one hundred dollars every five years thereafter, until the full sum of two hundred pounds should be paid. This latter case must have occurred frequently in principle, and, as I apprehend, in no case of the kind has it ever been determined that the lien of the judgment was not discharged by the judicial sale of the land, although made before the money became payable upon the judgment. Wherever the real amount or value of the lien or charge upon the land is capable of being reduced at any time to a sum certain in money by mere calculation, and is of a pecuniary character, I can perceive no [*448] sufficient reason for distinguishing it from the case where it is a sum certain and payable at or before the time of sale. If it were to be held that lands about to be sold under judicial process, must be sold subject to all liens upon them which have not become payable at or before the sale, it would not only be attended with great inconvenience, but would very much depress the prices that will be given on such sales, which everybody knows will continue to be sufficiently low at the best. If such a doctrine were to be established, a lien having only a single day to run at the time of the sale, would not be dis-

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charged by it ; for there is no principle by which we can distinguish between a day and a year, or between one and ten years, in such cases.

The third error is, an exception to the opinion of the court in admitting to be read in evidence the record of a judgment obtained against Abraham Hellman, for two hundred dollars, upon a bond in favour of John Hellman, bearing even date, as appeared from a recital of it in the declaration, with the date of the release, as appeared from the copy thereof as given in evidence. If the original release itself had been produced and given in evidence, after having given evidence of its execution, the record of this judgment might, perhaps, have had some bearing upon the cause, in order to support the release, by showing the consideration given for it, as it appeared to be a transaction of the same date. Judgment having been rendered, I think the record of it was not only evidence of the fact that the judgment was had, but also of its amount, and of the consideration or cause of action for which it had been rendered, which, as appeared from the declaration which formed a part of the record of the judgment, was a bond. I am therefore not prepared to say, that there was any error in admitting this judgment to be read in evidence to the jury, had the original release been properly given in evidence.

The fourth error is an exception to the answer of the court to the first point submitted by the plaintiff's counsel, upon which the court was requested to instruct the jury, "that the legacy was a charge upon the land, and that the sheriff's sale, under the conditions on which it was sold, did not divest the lien." In reply to this the court told the jury, "that the sheriff's vendee took the land discharged of the lien of the legacy, unless it was sold subject to the lien ; and in the opinion of the court there was no exception as to this lien in the conditions of sale." That the court below was right in directing the jury that the sheriff's sale of the land discharged it from the lien of the legacy has been already shown in what I have said upon the second error ; and as the conditions upon which sheriffs shall make judicial sales of land, I will merely observe, that so far as the rights and interests of the parties concerned therein are connected with the terms and conditions upon which such sales are to be made, and may be affected by them, the law has prescribed the terms and conditions, and it is not in the power of the sheriff, without the consent of all the parties concerned, to alter or change them, to the prejudice of any. The *sheriff himself has no power [*449] or authority to say that the land shall be sold subject to one lien and discharged from another. The rights and preferences of the lien creditors are all established by law, and each

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has a right to require payment of his demand from the sheriff, out of the money arising from the sale according to the seniority of his liens. In what I have just said, I do not include mortgage-creditors who are placed on a footing peculiar to themselves by a late act of assembly.

The fifth error, which is the only remaining one that has been insisted on, is an exception to the charge of the court to the jury, on the second point submitted by the plaintiff's counsel; which was, to charge the jury, "that John Hellman was incompetent to release the legacy given by the will of Christian Hellman, deceased, more especially as Abraham Hellman was one of the executors, and bound to guard the interests of the legatees." To this the court answered, "that John Hellman had a right to receive what his father had left to him, and he had a right to discharge his interest under the will in this case, if he was capable of managing his affairs."

From the terms in which this second point is drawn up by the plaintiff's counsel, it seems to me that the only question involved in it, was one of fact, proper to be left to the jury to be decided by them, that is, whether John Hellman possessed sufficient strength and soundness of mind to enable him to release his right to the legacy; and that the court below might have contented themselves in their answer, with leaving it as such to be settled by the jury. It is probable, however, that the discussion before the court and jury in regard to this point, took a much wider range than is expressed in it as reduced to writing, for the court in their answer speak of the nature of the legacy, and say that John had a right to receive it, and could therefore release it, if capable of managing his affairs. And in the argument before us, the character of the legacy has been introduced and objections made to John's being able to release it on account of its peculiar nature.

If the legacy be vested as the court below, from their answer must have considered it, then these objections are clearly groundless. That it is vested, and was so intended by the testator, is sufficiently manifest from the terms and whole tenor of the will itself. It appears from the will, that the testator had six children, who are all mentioned by name in it. To his son Abraham he gives certain specific articles of his personal estate, and the whole of his real estate, out of which he directs Abraham to pay one thousand pounds, to his other five children, John, (the plaintiff,) Catharine, Magdalene, Elizabeth, and Rachel, in the following manner: "to Catharine one hundred dollars one year after my death; to Magdalene one hundred dollars two years after my death; to John (the plaintiff) one hundred dollars three years after my death; to Elizabeth one hundred

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dollars four years after my death; to Rachel one hundred dollars five years after my death; the above payments to be yearly paid till they amount to *one thousand pounds, to be paid the above legatees." And in a subsequent independent clause, the testator adds, "It is further my will and desire, that my son John (the plaintiff) receive no principal, but receive the interest as it becomes due." To Abraham it is a specific bequest of certain articles of the testator's personal estate, and a devise of the whole of his real estate, minus one thousand pounds; and to his other five children it is in effect a pecuniary bequest of two hundred pounds to each of them, to be paid by Abraham in instalments of one hundred dollars each, commencing with the payments thereof at the times respectively appointed for the payment of the first hundred dollars to each respectively, and to be followed by a payment of one hundred dollars to him or her every five years thereafter, until each shall have received his or her two hundred pounds. And the subsequent clause in the will, expressing the will and desire of the testator that John should receive no principal, but the interest as it became due, is not to be construed as curtailing or lessening in amount the legacy previously given to John, putting him barely upon an equal footing with his sisters, but as cautionary and directory to Abraham, the devisee, to withhold payment of the principal, under circumstances that would be likely to make it of no benefit to John to receive it. The plain intent of the testator appears to have been, that Abraham should pay one thousand pounds to his other children, and that each of the latter should receive equal portions of it. Why should we nullify the express previous bequest of the principal to John, by the subsequent clause? For if the testator had not intended that John should have the benefit of the two hundred pounds for himself and his children, as well as each of the daughters, why has he expressly declared that he should, and pointed out so expressly the different periods at which it should be paid? I do not consider the subsequent clause so completely incompatible with the payment of the principal to John, and his representatives, as to overthrow it, for, generally, where the interest of a legacy is given to or in trust for the legatee, without any qualification, the principal will be considered as bequeathed also. 2 Roper on Leg. 331. In the case of a devise of realty, words of limitation must be added to give more than an estate for life; but in the case of personalty, words of qualification are required to restrain the extent and duration of the interest. *Prima facie*, a gift of the produce of a fund, is a gift of that produce in perpetuity; and is consequently a gift of the fund itself, unless there is something upon the face of the will, to show that such

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was not the intention. *Adamson v. Armitage*, 19 Ves. 416. Now even according to this rule, the payment of the interest to John not being restrained to any particular duration of time by the subsequent clause, amounts to a gift of it in perpetuity, which carries with it a gift of the principal itself. I cannot perceive the slightest indication of intention on the part of the testator, from his will, that Abraham should have the principal at John's death, which would be the inevitable consequence if it be not given by the will to John.

[*451] *It however has been contended, that inasmuch as the legacy here is charged upon land, until the time appointed for the payment of it by the will had arrived, and the legatee was found to be then living, it was not vested but contingent, and uncertain whether it ever would become payable: for if John, the legatee, had died before 1818, the time fixed for the payment of the first hundred dollars of the legacy, the whole of it would have sunk into the land or real estate devised to Abraham for his benefit, and the representatives of John would never have become entitled to receive any part of it; and therefore, at most, it could be released no further by John than it had become payable at the time of giving the release; and as the release alleged to have been given by him appears to have been made in May, 1815, and as no part of the legacy became payable till April, 1818, it is no bar to the plaintiff's recovery. It is true, that a distinction has prevailed between a legacy bequeathed to a legatee that is to be paid out of the personal estate, and one that is charged upon and to be paid out of the real estate, at a future day, to which the payment in either appears to have been postponed on account of the age of the legatee. The first has been held vested, in conformity to the rule of the civil law, which was adopted by the ecclesiastical courts, where cognizance was first taken of testamentary matters, and for sake of uniformity observed by courts of equity when they came to exercise a concurrent jurisdiction afterwards. 1 Roper on Leg. 376. But the second case never having fallen within ecclesiastical jurisdiction as it concerned the real estate, has been considered conditional or contingent, according to what was deemed to be the rule of the common law. 1 Roper on Leg. 432, *et seq.* If, however, the payment of the legacy charged upon real estate is not postponed on account of the age of the legatee or child, but in regard to the convenience of the person or circumstances of the estate charged with it, the legacy will be considered vested and not conditional. 1 Roper on Leg. 436, *et seq.* Now it is impossible to avoid seeing, that the payment of the legacy in question was postponed exclusively for the convenience and advantage of Abraham, the devisee of the land,

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who is charged with the payment of it, which gives to it the character of a vested legacy ; so that it never can sink into the land, but must be paid, in any event, either to the legatee himself, or to his assignees or representatives in case of his dying before the time appointed for payment. What then was there to prevent his releasing it at any time, if he were of sound mind and discretion ? It would scarcely seem to comport with free agency, to force a benefit upon a party against his will. There may be vested rights so completely personal as not to be assignable either in law or equity, but still they may be released. Indeed, I apprehend there are few if any vested rights that cannot be released by the person entitled to them.

The circumstance of the release having been given to Abraham Hellman, who, by the will, would seem to have been vested with the exercise of some discretion in regard to paying the principal of the *legacy to John, but as he might seem [*452] to require it, is not of itself sufficient to set aside the release and render it inoperative, though it may be a reason why the jury should be satisfied that it was fairly obtained. Abraham Hellman was at liberty to pay to John the principal as well as the interest of his legacy as it became payable ; or before, if he chose, because it was clearly to favour him that the time of payment was postponed.

I have left out of view all that is said in the will of the three hundred pounds, the interest of which is directed to be paid by Abraham to the widow during her widowhood ; and have declined to consider it as a part of the one thousand pounds ordered to be paid to the five children ; because if such were the intention of the testator, it is not expressed with sufficient clearness to afford any certainty of it ; and ought not therefore to be permitted, upon mere conjecture, to interfere with and to change what is clearly expressed.

The judgment is reserved for the first error assigned, and a *venire facias de novo* awarded.

Cited by Counsel, 5 Wh. 416 ; 6 Wh. 357 ; 6 W. 140 ; 7 W. 55 ; 8 W. 48 ; 9 W. 539 ; 10 W. 15 ; 1 W. & S. 239 ; 3 W. & S. 336 ; 5 W. & S. 148 ; 9 W. & S. 104 ; 2 Barr, 457 ; 10 Barr, 406 ; 1 H. 295 ; 3 H. 401 ; 7 H. 32 ; 8 H. 239 ; 10 H. 175 ; 11 H. 42 ; 1 C. 72 ; 11 C. 178, 346 ; 3 Wr. 239 ; 1 G. 429 ; 6 S. 52 ; 9 S. 74 ; 10 S. 508 ; 14 S. 272 ; 18 S. 225 ; 32 S. 472 ; 4 N. 31 ; 15 N. 131 ; 4 O. 203 ; 7 O. 75 ; s. c. 13 W. N. C. 274 ; 1 W. N. C. 437.

Cited by the Court, as to whether legacies are vested or contingent : 2 W. & S. 376 ; 10 Barr, 18 ; 1 Wr. 108 ; as to gift of income being gift of principal : 6 Wh. 77 ; 6 W. 17 ; 8 Barr, 41 ; 9 Wr. 368 ; 9 S. 73 ; 2 N. 315 ; s. c. 4 W. N. C. 33 ; 4 O. 204 ; as to what liens are divested by sheriff's sale : 6 W. 177 ; 3 Barr, 160 ; 5 Barr, 244, 420 ; 8 Barr, 476 ; as to what may be recorded : 3 W. & S. 54 ; 7 W. & S. 16 ; 2 O. 411 ; s. c. 10 W. N. C. 87 ; and see act, April 26, 1850, sec. 24, P. L. 581 ; as to authority of sheriff to make conditions discharging or continuing liens : 10 H. 317 and 11 C. 187, where the principal case is criticised.

[PHILADELPHIA, FEBRUARY 21, 1834.]

Earnest against Parke.

IN ERROR

An absolute and unconditional promise by one who has been discharged by the insolvent laws of this commonwealth, to pay a debt which existed before his discharge, creates a new contract upon which suit may be brought.

ON a writ of error to the Court of Common Pleas of *Philadelphia* county, the case was thus :

Parke, the defendant in error and defendant below, was indebted to the plaintiff, Earnest, in the sum of forty-nine dollars seven cents, for goods sold and delivered. He afterwards took the benefit of the insolvent law of this commonwealth, and subsequently to his discharge, he made an absolute and unconditional promise to pay the debt. The plaintiff having brought suit against him, and proved the debt on the trial in the court below, that court was of opinion that the promise was without consideration and void, and entered judgment for the defendant.

In this opinion error was assigned in this court.

J. Randall, for the plaintiff in error.—According to the opinion of the court below, the judgment, instead of being for the defendant should have been a qualified one for the plaintiff. This mistake was the effect of inadvertence. But the judgment ought to have been absolutely for the plaintiff. The promise of [*453] a debtor discharged under *the insolvent laws, to pay the debt, creates a new contract, which is binding upon him. That a promise to pay a debt contracted during infancy, or one which is barred by the act of limitations, or discharged by bankruptcy, is obligatory and may be enforced at law, cannot be disputed, and the principles upon which such promises are held to be operative are applicable with at least as much force to a promise to pay a debt by a debtor who has been discharged by the insolvent laws, where the debt still remains, and the debtor has only been exempted from the operation of one remedy, viz., the imprisonment of his person, which like every other legal exemption, he is competent to waive. The case of *Willing v. Peters*, 12 Serg. & Rawle, 177, in which it was held that a debt voluntarily released by the creditor is a good consideration for a subsequent promise to pay it, goes on the broad principle that wherever there exists a moral obligation to pay a debt it is a sufficient basis for a new promise. The reasons for not permitting a defendant to be held to bail on such an alleged promise,

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do not apply to the question now presented to the court. *Prima facie*, the discharge operates until it is set aside by a verdict. In *Turner v. Schomberg*, 2 Str. 1233, the defendant was discharged on common bail, on the ground that the arrest was on no new consideration, but the old debt. So in *Taylor v. Wasteneys*, 2 Str. 1218, where the defendant having been arrested, lay in jail till he was superseded, and afterwards having given a new note for the debt, upon which a fresh action was brought, he was held to bail. The court discharged him on common bail, as the note was but a further security, and did not extinguish the former cause of action. Where, however, the new promise creates a new contract and gives a new cause of action, the debtor may be held to bail. *Hat v. Bordier*, 2 W. Bl. 724; *Ford v. Chilton*, Ib. 798; *Meason v. Hen*, Ib. 1217; *Bailey v. Dillon*, 2 Burr. 736; *Freeman v. Fenton*, Cowp. 544; *Sharpe v. Iffgrave*, 3 Bos. & Pul. 394; *Wilson v. Kemp*, 3 M. & S. 595; *Hudson v. Maggridge*, 6 Taunt. 563; 1 Chitty's Pl. 35; *Peterd. Bail*, 113; 2 Saund. Pl. 106, 588; *Shipley v. Henderson*, 17 John. 178; *Couch v. Ash*, 5 Cowen, 265; *Hubert v. Williams*, Ib. 537; *Moore v. Viele*, 4 Wend. 420. In Pennsylvania it is settled that the old debt is merely the consideration upon which the new promise raises a new and available contract, on which suit may be brought. *Lonsdale v. Brown*, 4 Wash. C. C. R. 148; *Kingston v. Wharton*, 2 Serg. & Rawle, 208; *Case of Field's Estate*, 2 Rawle, 351.

E. Hurst, for the defendant in error.—Evidence of a mere naked promise by an insolvent to pay a debt due before his discharge, is not sufficient to show an intention to waive his privilege from arrest, which is a vested right, purchased by the assignment of his property for the benefit of his creditors. Nothing but a clear, absolute agreement, not made out by implication, but proved by direct evidence, can deprive him of this privilege. Insolvent laws are to be construed liberally in favour of the debtor. *Young v. Aimes*, 2 Burr. 901. An *insolvent [*454] debtor may promise to pay, in order to waive the bar of the act of limitation, or with an honest intention to perform his promise when in a situation to do so, without intending to waive his right to personal freedom, and it would operate very unjustly upon him, if in making such a promise he should be entrapped into a surrender of the only advantage he had derived from his discharge, which he never intended to give up.

It is against the policy of the law to give the effect contended for on the opposite side, to such a promise as that on which this suit is brought. It would put the debtor in the power of the creditor, and lead to promises to pay certain creditors to the exclu-

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sion of others, in consideration of their withdrawing their opposition to the debtor's discharge. Such promises have always been considered void. Ingraham on Insolvency, 104; Baker v. Matlack, Ashmead's Reps. 68.

The promise to pay creates no new debt, but has exclusive reference to the one previously existing, which still remains in full force as a debt, and has lost nothing but one of the remedies provided by law for its recovery. In this respect it differs from a debt discharged by bankruptcy, or a voluntary release, where the debt itself and all remedies for it are taken away either by act of law or the act of the parties. The moral obligation alone remains which has been deemed a sufficient consideration for a promise to pay the debt, which necessarily creates a new contract on which suit may be brought. In the case of a debtor discharged under our insolvent laws, the new promise is superfluous, for the original debt remains. The promise amounts to nothing more than an acknowledgment of an existing liability. If the debtor is arrested upon it, he may be discharged by *habeas corpus*. Ingraham on Insolvency, 208. So if he confesses a general judgment, he may be relieved. He also cited Landis v. Urie, 10 Serg. & Rawle, 331; 5 Cowan, 195; Elderton v. Freemantle, Lofft. 36; Act of the 26th of March, 1814, sec. 12; Purd. Dig. 362.

The opinion of the court was delivered by

ROGERS, J.—The defendant, Parke, was indebted to the plaintiff, Earnest, for goods sold and delivered. After the debt was contracted, Parke took the benefit of the law for the relief of insolvent debtors, but subsequent to his discharge he made an absolute and unconditional promise to pay the debt. The plaintiff sued the defendant, and on the trial proved the promise, and the point is, whether the Court of Common Pleas were correct in ruling that the promise to pay was without consideration and void, and for this reason entering a judgment for the defendant.

This is the first time the question has arisen in this shape. It has been presented heretofore on applications to discharge debtors from arrest, on common bail on mesne process; sometimes, though rarely, on final process, or in cases where suit had [*455] been brought on the old debt, and not on the new promise. All of these may be distinguishable from the present. The court has decided the broad principle, that the promise is without consideration, which may be a distinct question from the legal effect which may result from a new promise or contract as regards the right of arrest, either on mesne or final process. We must, in the first instance, discard all consid-

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erations arising from the fact, that this is a parol promise; for the law of this state unquestionably is, that the promise being admitted or proved, it has the same legal effect as if made in writing in the most solemn form. That the defendant made a promise to pay the debt, without qualification, is part of the case. No fraud or surprise is alleged; we therefore labour under no embarrassment in our inquiries on that account. I must also further remark, that if parties are liable to be entrapped by slight or hasty acknowledgments, it may be a reason for a legislative remedy to meet the case, but cannot be an argument entitled to much favour in a court of justice. In point of fact, this was neither a slight nor hasty acknowledgment of indebtedness, but a promise deliberately made, with no greater or less legal effect than would have resulted from a note of hand, or a bond with a warrant of attorney to confess a judgment. If this promise is void, for the same reason a note or bond, given by a discharged insolvent debtor to his creditor, would be void also.

On principle, we are unanimously of the opinion, this judgment cannot be supported; and for the following reasons. It has been repeatedly held, that a debt due in honour and conscience, is a good consideration for a promise to pay, and for this principle, which has a direct bearing on the case, I refer generally to the authorities cited at the bar. Indeed, this is not denied in bankruptcy, infancy, or in cases where debts are barred by the act of limitations; but a distinction is attempted in favour of an insolvent debtor, the reasons of which I shall examine hereafter. In *Willing v. Peters*, 12 Serg. & Rawle, 177, it is decided that a promise by a debtor, after the execution of a voluntary release under seal by the creditor, at the debtor's request, to pay the balance of the debt, is founded on a sufficient consideration. The principle is fully recognized, that even where a debt is so far extinguished as not to be recoverable either in law or equity, but yet exists in morality and good conscience, it affords a sufficient consideration for an assumption. This is exemplified in the case of a bankrupt, for although the debt is discharged in law, yet, by the common sense and feeling of mankind, it exists, until it is actually paid. It is difficult to imagine a case stronger, in illustration of the general principle which has been assumed, than the case just cited. There, Mr. Peters gave a voluntary release of the debt, but notwithstanding the debt was extinguished by his own act, yet the previous indebtedness was held to be a valid consideration for the promise by Willing to pay. In the case at bar, Parke not only owes the money in honesty and good conscience, but in law also. The debt still remains, although his person by the discharge is

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[*456] exempted from *arrest; and in this respect, the discharge of an insolvent differs from a certificate in bankruptcy; and this gives rise to one of the arguments on which the defendant in error mainly relies.

It is contended, that as the debt of an insolvent debtor remains in full force, a mere naked promise to pay it, not founded on a new consideration, such as forbearance, cannot alter the situation of the parties as between themselves, so as to give the creditor a new remedy, when no new responsibility is created. I must say, I cannot feel the difficulty which seems to have struck the mind of the counsel with so much force. If it alters the situation of the parties in a case of bankruptcy, or where, as in *Willing v. Peters*, the debt is distinguished by a voluntary release, some satisfactory reason should be given why it does not produce the same effect, in the case of insolvent debtors, where the debt remains, and one only of his remedies is gone. If it has that same effect in the instance stated, (and that it has cannot be controverted,) much more so should it produce this result in the case at bar. The argument *a fortiori* is in my judgment, exceedingly strong. But the argument is founded on fallacy. It assumes a position which is by no means conceded. Before we yield to its force, we must be convinced that no new responsibility is created. And so far from this being the case, I am persuaded the promise by an insolvent debtor to pay a debt, does create a new responsibility. By entering into a new contract, which I shall show the Supreme Court, in *Field's Case*, have decided this to be, Parke consents to waive the benefit of the law, and subject his person to arrest. It cannot be denied, that a party may either expressly, or by implication, waive a provision in law intended for his benefit, as is shown in cases of infancy, or in the common cases arising under the act of limitations, and this is an answer to *Landis v. Urie et al.*, 10 Serg. & Rawle, 323. It is true as is there decided, "that if a man promise to pay his bond without any new consideration, *assumpsit* cannot be brought for the money;" and the reason is, because there is neither a new consideration, nor a new responsibility. The promise left the contract just where it found it, and therefore it would be idle to support an action of *assumpsit*, on a promise to pay; the remedy, and it is an effectual one, is on the bond itself. But when that is not the case, the opinion of Lord Kenyon to the contrary notwithstanding, the law is otherwise. As where, under the act of the 28th of May, 1715, a bond has been informally assigned, a parol promise to the assignee to pay him the money secured by the bond, would support *assumpsit*, and the reason is, because the promise effects a change in the situation of the parties, by enabling the plaintiff to bring

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a suit in his own name, and alters the liability of the defendant. The decision of the court in Field's Case, 2 Rawle's Reps. 351, to which I have before referred, has a direct bearing on this question. It goes far to show, that by a subsequent promise a new contract, and of course a new responsibility, is created. Indeed all the modern cases on the act of limitations, which bear a strong *analogy in this respect to the present, go entirely on the ground of a new contract. The idea [*457] that by the promise the old debt is revived, has been exploded, and in effecting this change the courts of this state have taken a distinguished part.

Field's Case was a case of bankruptcy; but that I have endeavoured to show, if it makes any difference in principle, is rather against the argument of the defendant in error. It was there held, that a debt discharged by a certificate of bankruptcy, is an available consideration for a new promise: That a promise to pay a specialty debt, which has been discharged by a certificate of bankruptcy, does not revive the original debt as a debt by specialty, but that the original debt is a consideration which renders the new promise available. The court were of the opinion, that the creditor had a right to come upon the fund on the new contract, as a simple contract creditor, but not on the footing of a debt due by specialty; and that by the promise to pay, a new debt was contracted. Lord Mansfield says, in one of the cases cited, "that where a remedy is taken away, and not the debt, the debt is a debt in conscience, and may be the ground of a future promise or security." The counsel for the defendant in error, seem to feel the force of this position, the truth of which they admit in relation to a case in which all remedies are taken away, as in the case of infancy, a debt barred by the act of limitations, or by the bankruptcy and certificate of the defendant, but they deny it as regards a case where only one remedy is gone. No reason has been given for the distinction at the bar, and it is not easy to understand why a promise should revive several remedies, and yet should not have the legal effect of reviving one remedy. I can perceive no good reason for any anxiety to exempt insolvents from liability on account of their contracts. If, as in Field's Case, it is a new contract, the defendant, by the new engagement into which he has voluntarily entered, has rendered himself liable to suit, and to all the remedies pursued in the collection of debts, among which, in the eye of the law, the right to arrest the person on final process, and its consequences, are not the least important. This remedy may sometimes enable a creditor, by appealing to the oath of his debtor, to recover a just debt. It gives a right to the legal assignee to collect the assets of the insolvent, whether it be

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property in possession, or choses in action; and without this remedy, we are well aware an insolvent debtor may put his creditors at defiance, so far as regards property, which cannot be seized in execution.

I have remarked, that this question comes before the court in a new shape, for as Mr. Ingraham observes, in his Treatise on Insolvency, the cases which have occurred in this state have been decisions by single judges, the parties sued upon the new promise being in confinement upon magistrates' executions, and applying by *habeas corpus* to be discharged. In forming our opinion, we have given the decisions cited, all the attention which they so justly deserve, without however arriving at the same result. The Chief Justice has no note *of Heppard v. Douglas, [*458] Ingr. on Insol. 208, nor any recollection of the circumstances of the case. We have no certainty that the case has been accurately reported; on inquiry we find it is impossible to ascertain the facts, on which it so materially depends. No doubt the case of Heppard v. Douglas had great weight with the judges, who are said to have ruled the point in their chambers in the same way.

Several cases have been cited from the New York reports, but in that state the question does not appear to be settled. In *Scouton v. Eislord*, 7 John. Rep. 36, where it is first noticed, it is decided, that a debt due by an insolvent as well as a bankrupt, is a debt due in conscience, and is a sufficient consideration for a new promise to pay the debt. *Shippey v. Henderson*, 14 John. Rep. 178, as was supposed, contained the same principle. But it is said, *Couch v. Ash*, 5 Cowen Rep. 265, and *Hubert v. Williams*, 5 Cowen Rep. 537, establish a contrary doctrine; and there is reason for this assertion, unless the cases can be distinguished on the ground that the action was upon the original debt, and not upon the new promise, thereby indicating an election on the part of the plaintiff to consider the new promise as nothing more than a revival of the old debt, and not a new contract. And this idea would seem to have had some effect on Justice Sutherland, who delivered the opinion of the court. There was no new consideration, he says, for the subsequent acknowledgment, or promise to pay the debt. The action is not upon that, but upon the original promise. He afterwards says that the defendant was never discharged from the debt. The new promise, therefore, was nothing more than an acknowledgment of his existing liability, and would not be a foundation for a new action. If, however, as is contended, the court intended to say, that no action would lie on a new contract entered into by the insolvent, the consideration of which was the previous indebtedness, I must dissent from the principle, and must

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further say, that the cases cited, if not at war with Shippey v. Henderson, are in opposition to Scouton v. Eislord, which were not even cited by court or counsel.

The authorities cited at the bar, are for the most part cases which have arisen on applications to discharge the debtor from arrest, on common bail. They do not, I conceive, affect the general principle. Bailey v. Dillon, 2 Burr. 736, shows the reason the courts discharge an insolvent debtor from arrest on common bail. In Bailey v. Dillon, the general question was, whether a person indebted to another, and afterwards becoming bankrupt, and being regularly discharged by having conformed himself to the bankrupt acts, and having obtained his certificate, but afterwards making a new acknowledgment of the same debt being due, and also a new promise to pay it, shall, or shall not be liable to payment?

The plaintiff had arrested the defendant, and the application to the court was to discharge him on common bail. And in relation to this point, the court say, it is quite unnecessary to enter into the general or principal question, or enter at all into the merits of the case upon *the present motion, since [*459] it would be very improper to determine such a point, in this method, upon a question about special or common bail. Therefore, they said, they would not meddle with the merits, nor give any opinion at all on the general question. But as to the particular question, which was the subject of the present motion, they were unanimous that he ought to be discharged on common bail.

These questions have generally arisen on a parol promise to pay the debt, and as the fact of the promise may admit of dispute, the court will not, in this stage of the proceedings, inquire whether the parties have entered into a new contract, and particularly when the suit is brought upon the old debt. And although the plaintiff makes a positive affidavit of the debt, yet this being in its nature *ex parte*, has not been considered such evidence of the fact of indebtedness, as to justify holding the defendant to special bail. The courts have felt it their duty to discharge on common bail, and leave the fact of a new promise to be ascertained by a jury. This is a decision in favour of liberty, and as far as it goes I have nothing to urge against its correctness.

The cases bearing on this question, in England, before and since 1776, have been cited by Mr. Ingraham in his Treatise on Insolvency, page 202, and are very much at variance with each other; so much so, that it is difficult to know what the law now is in that country. Since 1776, they are not authority in this

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state, nor have they much to recommend them from the intrinsic merits of the decisions themselves.

An argument has been drawn from the words of the act. Stress has been laid on the word "occasioned." After an examination of the act, I cannot bring myself to believe, that the word "occasioned" is of larger import than the words "accrued and due," with which they are associated in the act. If, as in *Field's Case*, by the new promise a new debt is created, there is nothing in the act, or in the reason of the thing, which can prevent the creditor from availing himself of it as a new contract, except that he cannot, in certain cases, hold him to special bail. And this exception, in my opinion, depends as much upon authority, as any reason that may be offered in support of it.

In *Shippey v. Henderson*, it is said, that where a debt has been barred by the defendant's discharge under the insolvent act, it is proper for the plaintiff to declare upon the original cause of action, without noticing the subsequent promise. And when this is done, the court will of course discharge the defendant from arrest, on common bail, and this is perhaps the reason that we have such contrariety of decisions on this point. It has been viewed merely as the revival of the old debt, as in the case of the act of limitations. Had it been considered in the light of a new contract, as it has uniformly been in Pennsylvania, difficulties would have been avoided. The defendant has the same power to make this as any other contract, and the contract being made, it would have created a valid debt, recoverable at [*460] law, by all the remedies common to other actions. In *Field's Case* it is intimated that suit should be brought on the new promise, as the new promise, and not the old debt, is the meritorious cause of action.

Judgment reversed.

Approved, 4 Wh. 498; 14 W. N. C. 362.

Cited by the Court, 2 J. 245; 11 W. N. C. 166.

[PHILADELPHIA, FEBRUARY 21, 1834.]

Ristine against Ristine.

APPEAL.

Adultery committed by the husband after the wife has separated herself from him, is no bar to his obtaining a divorce, in consequence of the wife's wilful and malicious desertion, and absence from his habitation without reasonable cause for the space of two years and upwards.

[Ristine v. Ristine.]

APPEAL from the decree of the Court of Common Pleas of *Philadelphia* county, dismissing, with costs, the libel of John Ristine, praying for a divorce from his wife, Elizabeth Ristine.

The libel set forth that the parties were married on the 19th of November, 1819, and lived together until November, 1823, and that since that time the respondent had "wilfully and maliciously deserted, and absented herself from the habitation of the libellant without any just and reasonable cause, and such desertion had persisted in for the term of two years and upwards, and yet continued to absent herself from the said libellant," and prayed that he might be divorced from the bond of matrimony.

The answer to the libel stated, *First*, That the respondent did not maliciously desert and absent herself from the habitation of the libellant without reasonable cause, but that on the contrary the libellant had compelled her to do so by his cruel conduct.

Secondly, That the libellant since their separation had lived in habits of adultery with Ann Sweeninger, and had thereby forfeited his right to claim a decree in his favour.

The libellant took issue on the first branch of the answer and demurred to the second. The respondent joined in the demurrer, which the court overruled, and made a decree dismissing the libel and directing the libellant to pay all the costs.

Campbell, for the appellant, referred to the act of the 13th of March, 1815; see 7 Purd. Dig. 213.

Scott, contra, cited Paynter on Marriage and Divorce, 222, 226, (note.) *Brisco v. Brisco*, 2 Adam's Eccl. Rep. 259; *Sullivan v. Sullivan*, *Ib.* 299.

The opinion of the court was delivered by

*KENNEDY, J.—We think that the Court of Common Pleas erred in rendering a judgment upon the demurrer [*461] in favour of the defendant. The proceeding in this case is founded upon our act of assembly, passed the 13th of March, 1815, Purd. Dig. 212, (1831.) The first section enacts, that "When a marriage hath been heretofore, or shall hereafter be contracted and celebrated between any two persons, and it shall be judged in the manner hereinafter mentioned, that either party at the time of the contract, was, and still is naturally impotent or incapable of procreation, or that he or she hath knowingly entered into a second marriage, in violation of the previous vow

[*Ristine v. Ristine.*]

he or she made to the former wife or husband, whose marriage is still subsisting, or that either party shall have committed adultery, or wilful and malicious desertion, and absence from the habitation of the other, without reasonable cause, for and during the term and space of two years; or when any husband shall have by cruel and barbarous treatment endangered his wife's life, or offered such indignities to her person as to render her condition intolerable, and life burdensome, and thereby force her to withdraw from his house and family; in every such case, it shall, and may be lawful for the innocent and injured person to obtain a divorce from the bond of matrimony." By the seventh section it is further enacted, that "in any action or suit commenced in the said court for a divorce for the cause of adultery, if the defendant shall allege and prove that the plaintiff has been guilty of the like crime, or has admitted the defendant into conjugal society or embraces, after he or she knew of the criminal fact, or that the said plaintiff (if the husband) allowed of the wife's prostitutions, or received hire for them, or exposed his wife to lewd company, whereby she became ensnared to the crime aforesaid, it shall be a good defence and a perpetual bar against the same."

The ground set forth by the plaintiff in his libel for claiming to be divorced from the defendant in this case, is her wilful and malicious desertion and absence from his habitation without a reasonable cause for and during the term and space of two years and upwards. This is clearly made sufficient cause for a divorce, by the express terms of the act; and if true, there is certainly no part of the act which declares that the adultery of the plaintiff committed by him after he had been so deserted by the defendant, shall be a bar to the plaintiff's obtaining a divorce. Had he, however, committed such offence while his wife was living with him, it might have been very reasonable cause for her leaving him; but that is not alleged. There is nothing in the act which seems to favour the idea of making the adultery of the plaintiff, committed by him after he has been deserted by the defendant, a bar to obtaining a divorce, except that in the preamble thereto, the giving "relief to the innocent and injured party" is mentioned as a reason for passing the act: And again in the close of the first section which I have recited, it is declared, that "in every such case it shall and may be lawful for the innocent and injured person to obtain a divorce from the [*462] bond of matrimony." These clauses or expressions *might have had great weight in sustaining the judgment of Common Pleas in this case, were it not for the declaration contained in the seventh section, which I have also recited, that seems to demonstrate the design and intention of the legis-

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lature in regard to this question, with a clearness that removes all doubt, as I conceive.

This section declares that adultery committed by the plaintiff, shall be a good defence, and a perpetual bar against his obtaining a divorce in any case where he sues for it, on account of adultery committed by the defendant. By the express terms of the act, the adultery of the plaintiff is made a bar to his or her obtaining a divorce, in case it be claimed for the cause of adultery, charged to have been committed by the defendant, and not for any of the other causes set forth and declared by the act to be sufficient to entitle the party to a divorce. The legislature by confining this defence to the single case of a divorce sued for on account of adultery, alleged to have been committed by the defendant, may fairly be considered as having intended to make it the only case in which such a defence should be available, unless as a good excuse or "reasonable cause" for the defendant's deserting and leaving the plaintiff. If they had intended to make it a good defence in the other cases as well as this, they would doubtless have so declared it. No good reason can be given why they should have designated this one case and not the others, if they intended to place the latter on the same footing with the other. The same motive which induced them to provide expressly for the one case, would have induced them to have extended the same provisions to the other cases, had they so intended it. The reason or propriety of making this distinction need not be inquired after. For although we may not be able to discover any, still that would not be sufficient to warrant a construction of the act, contrary to what we are irresistibly brought to believe was the intention of the legislature from the whole frame and structure of the act itself. The maxim *expressio unius est exclusio alterius et expressum facit cessare tacitum* is directly applicable, and sustains our construction of this act. The judgment of the Court of Common Pleas is reversed, and the parties are at liberty now to proceed to the trial of the issue taken on the facts alleged by the plaintiff in his libel, as the cause for his claiming a divorce.

Decree reversed.

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*[PHILADELPHIA, FEBRUARY 21, 1834.]

Dundas against Bladen.

Where a suit is commenced in this court by a writ returnable on the return day in July, the plaintiff cannot take out a rule of arbitration until after the first day of the following December term.

IN this suit, which was an action on the case brought in this court by Alexander Dundas to the use of Alexander Dougherty against Martha Bladen, the writ was returnable on the return day in July, 1833. The plaintiff on the 5th of August, 1833, took out a rule of arbitration, and on the 28th of the same month an award of arbitrators in his favour was filed for seven hundred and ninety-seven dollars fifty-four cents. The defendant appealed, and afterwards, having filed an exception to the award, on the ground that the rule of arbitration was entered before the first day of the first term after the suit was commenced, moved the court on the first day of December Term, 1833, to set aside the rule of arbitration, and all the proceedings under it.

Chauncey in support of the motion
F. E. Brewster, contra.

PER CURIAM.—It is always safe to adhere to the plain words of a statute. To impute a speculative intent to the legislature in respect to cases that were probably not actually in their view, would lead to uncertainty, and in the end contrariety of decision. They have declared in positive terms that the plaintiff shall not refer without the defendant's consent before the ensuing term; and we see no reason to make the present case an exception.

Rule of reference and proceedings on it set aside.

Cited by Counsel, 4 Wh. 359; 4 Wr. 154.

*[PHILADELPHIA, FEBRUARY 21, 1834.]

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M'Laughlin *against* The Commonwealth.

IN ERROR.

An indictment for stealing three promissory notes for the payment of money, commonly called bank-notes, on the Bank of the United States, is good.

In an indictment for stealing promissory notes for the payment of money, drawn by a bank, it is not necessary to state that the bank was duly incorporated.

Nor is it necessary that it should aver that the notes charged to have been stolen were due and unpaid.

ERROR to the Mayor's Court of the city of *Philadelphia*.

Thomas M'Laughlin, *alias* Jennings, was indicted for the larceny of "three promissory notes for the payment of money, commonly called bank-notes, on the Bank of the United States, for the payment of twenty dollars each, and of the value altogether of sixty dollars; four promissory notes for the payment of money, commonly called bank-notes, on the Bank of the United States, for the payment of ten dollars each, and of the value altogether of forty dollars; altogether of the value of one hundred dollars, of the goods and chattels, moneys and property of Samuel Swartout," &c.

He was convicted of the offence charged, and his counsel filed the following reasons in arrest of judgment.

1st. That the indictment describes the notes alleged to have been stolen, as promissory notes on the Bank of the United States, when it should have described them as promissory notes of the said bank.

2d. That the notes alleged to have been stolen are not stated to have been of a bank duly incorporated.

3d. That the said notes should have been described in said indictment as "due and unpaid."

4th. That the indictment is defective in matters of form and of law, and describes no legal offence.

The Mayor's Court sentenced him to two years' imprisonment.

S. Rush, for the plaintiff in error, cited Act of 30th January, 1810, *Purd. Dig.* 821; 7 *Peter's Rep.* 164; *Spangler v. The Commonwealth*, 3 *Binn.* 533; *Stewart v. The Commonwealth*, 4 *Serg. & Rawle*, 194; *City Hall Recorder*, 32; 13 *John.* 90.

Dallas, (Attorney General,) for the commonwealth, referred to the act of the 5th of April, 1790, *Purd. Dig.* 818.

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The opinion of the court was delivered by

KENNEDY, J.—The first error assigned in this case is, that the notes charged to have been stolen, are described as being “on the bank,” &c., instead of “of the bank,” &c. It may be questionable whether the description contended for would have [*465] been much more accurate, or *less free from criticism than the one adopted; at least it might have been thought by some liable to objection; for in the case of the *Commonwealth v. Boyer*, 1 Binn. 203, the counsel for the defendant took exception to the word “of,” being used where the word “on” is employed in the case before us; because it conveyed, as was said, the idea of the notes being the property of the bank, instead of their having been drawn by it. Although it might have been more proper to have described the notes as drawn by the bank, yet we think that the description is perfectly intelligible, and such as admits of but one meaning, which is, that the notes charged to have been stolen were drawn by the Bank of the United States. It is not necessary that the words or terms used in framing indictments, should be always such as have been adopted and approved by the best authors or lexicographers; it is sufficient if they have received from common use a fixed, precise, and definite meaning, and according to such meaning import clearly what is sufficient to make out the charge, and to render it certain. As if a man be indicted for entry into certain lands, and mowing an acre of hay, it is good, though it is not proper, because it is not hay but grass before mowing. 14 Vin. Abr. tit. Indictment, (N.) page 386, pl. 1. So if it be for entry and mowing an acre of corn, it is good, though it had been more proper to say for mowing an acre sown with corn. *Ib.* pl. 2. I do not therefore consider the first error sufficient to reverse the judgment.

The second error is, that the Bank of the United States, on which the notes charged to have been stolen are said to be, is not alleged to be duly incorporated. The case of *Spangler v. The Commonwealth*, 3 Binn. 533, has been cited and relied on to support this exception. This court held in that case, that it ought to appear on the face of the indictment, when notes alleged to be stolen, are the notes of a bank, that the bank was incorporated, or lawfully authorized to draw and issue such notes. It is necessary to observe, that the prosecution and decision in that case were founded upon portions of acts of assembly which have since been repealed. The act of the 30th of January, 1810, declaring that “the robbery or larceny of any bank-note of any incorporated bank should be punished in the same manner as the robbery or larceny of any goods or chattels of equal amount,” which was then in force, has since been repealed by an act of the 10th

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of March, 1817; which also enacts that the "robbery or larceny of any promissory note or notes for the payment of money, shall be punishable in the same manner as the robbery or larceny of any goods or chattels." And another act, of the 19th of March, 1810, which was also then in force, declaring all unincorporated banks to be unlawful, and that all payments made or accepted in their notes should be null and void, has, as to this latter clause, been in some degree repealed by an act of the 22d of March, 1817, 6 Smith's L. 444, which declares and makes all such notes recoverable: thus making them of a value equal to their nominal amount. The act of the 5th of April, 1790, as well as the act of the 10th of *March, 1817, already in part recited, making the [*466] robbery or larceny of any promissory note or notes for the payment of money punishable in the same manner as the robbery or larceny of any goods and chattels, are clearly sufficient in terms to embrace or include notes issued for the payment of money by either incorporated or unincorporated banks. And since the notes of unincorporated banks have been made binding and recoverable, and by this means rendered as valuable as the notes of incorporated banks, or even those of individuals, no good reason can be given, I apprehend, why a distinction should be made, and why all should not be considered as comprehended within the terms of the last-mentioned acts of assembly. Indeed, if bank-notes for the payment of money are not included within these acts of 1790 and 1817, there is then no act in force making it robbery or larceny to rob or to steal the notes of either incorporated or unincorporated banks; for the act of 1810 which made it robbery or larceny to rob or steal bank-notes of any incorporated bank, *eo nomine*, was repealed, as already stated, by the act of 1817. But we think that promissory notes issued for the payment of money, by either incorporated or unincorporated banks, come within both the letter and meaning of the acts of 1790 and 1817, and that it is therefore larceny to steal either; and, of course, the second error it not sustainable.

The remaining error is, that the notes charged to have been stolen are not described as being "due and unpaid." In support of this, the *dictum* of the late Mr. Justice Duncan, in the case of *Stewart v. The Commonwealth*, 4 Serg. & Rawle, 195, and the indictments in one or two cases reported in Rogers' *Crim. Ca.* (New York) where the notes charged to have been stolen appear to be so described, have been referred to. I consider even the *dictum* of that learned and eminent judge entitled to great respect, and sufficient at least to induce me to examine the matter closely, where it happens to be at variance with my

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own previous opinion on the subject, before I should be satisfied that I was right. The only reason, I apprehend, that can be given for making such an averment necessary in respect to the notes is, to show that they are of real value: because if paid, it might be said, perhaps, in most cases, that they could therefore be of no real value; and that it would not only be oppressive and highly unjust, but contrary to the spirit of our penal code, to make them the subject of larceny. It, however, appears to me, that the description of the notes given in the indictment in this case, taken in connection with the allegations therein contained in respect to them, show distinctly that they were of real, substantial value. I do not consider it at all necessary that an express allegation should be made in the indictment, that the notes were unpaid at the time they are alleged to have been stolen, because that circumstance forms no part of the description of the notes given in the act of assembly itself, that are thereby made the subject of robbery or larceny. If the legislature in describing the notes that were thereby intended to be made the subject of robbery and larceny had used the term "unpaid" I [*467] am *inclined to think that it would have been necessary to have used it also in the indictment, in describing the notes charged to have been stolen. But it is most likely that the legislature, in forming the act, purposely omitted it, with a view of making it robbery or larceny to rob or steal from the bank itself, notes drawn and executed by it in the usual negotiable form for the payment of money, which had never been delivered out of the bank to any one, but retained still in its possession, ready, however, to be issued and paid out in the ordinary course of its business, or to rob or to steal notes of the bank from its own possession, which had been issued but taken up again and paid by it. For I have no doubt, but the bank would be liable to pay notes thus stolen from it, after they had come into the hands of *bona fide* holders, although they might have received them from the thief himself. Such an averment, it would seem, could not therefore be made with propriety in all cases and especially in the cases of bank-notes, it does not appear to be necessary in order to make them always of real, substantial value. Being in negotiable form, and for the payment of money, they are considered as part of the circulating medium of the country: and the man who is about to receive them in payment in the ordinary course of his lawful business, is no more bound to inquire how and by what means the holder came by the possession of them, and whether they were obtained from the bank by its consent or not, than he is bound to inquire of his debtor, who offers to pay him in dollars coined at the mint of the United States, how he came by them, and whether or not they

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were obtained lawfully from the mint. If such an inquiry did not always prove equally unsuccessful as to both, it would unquestionably, to a great extent, defeat the all-important design of making them. Hence I am led to believe, that the introduction of an averment into the indictment, that the notes of a bank charged to have been stolen, were unpaid at the time, is unnecessary, and not required by the act of assembly creating the offence. By necessary inference, however, it does appear in this case, that the notes stolen were unpaid as to Samuel Swartout, who is stated to have been the proprietor of them, and that their value was of an amount equal to the aggregate sum of money for which they called on their face, which could not be if Mr. Swartout had received payment from the bank.

Judgment affirmed.

Cited by Counsel, 1 Barr, 155.

END OF DECEMBER TERM, 1833.—EASTERN DISTRICT

CASES
IN
THE SUPREME COURT
OF
PENNSYLVANIA.

EASTERN DISTRICT—MARCH TERM 1834

[PHILADELPHIA, MARCH 29, 1834.]

Case of the Accounts of Siter and Another, Guardians
of Jordan.

APPEAL.

A deed by a husband conveying the wife's choses in action to trustees for the benefit of the wife and her child, though not a reduction of such choses in action into possession, nevertheless passes not only the interest of the husband, but that of the wife also, to the trustees, upon the trusts declared in the deed. Consequently, upon the death of the husband, such choses in action do not survive to the wife, so as to entitle a husband whom she has subsequently married to claim them as her property.

THIS was an appeal from the decree of the Orphans' Court of *Chester* county, confirming the guardianship account of the appellees, Edward Siter and Dewalt Beaver, guardians of Ann Jordan late Siter. The appeal was taken by Hiram Taylor, who after the death of her first husband, Jordan, intermarried with the ward.

The facts material to the point made here were these. Adam Siter, the father of the ward, died in 1799, intestate, and leaving real and personal estate, a widow and children. In 1803, the appellees were appointed guardians of the person and estate of his daughter Ann, then an infant under the age of fourteen years, and subsequently intermarried with John M. Jordan. In the settlement of their account, they took credit for three thousand six hundred and sixteen dollars and seventy-eight cents,

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retained by them as trustees for their ward, and her son Andrew M. Jordan, under a deed executed by her husband John M. Jordan, on the 23d day of October, 1817, in the words following: "Know all men by these presents, that I, John M. Jordan, late of Blockley township, Philadelphia county, and state of Pennsylvania, do hereby acknowledge to have received of Edward *Siter of Radnor township, Delaware county, [*469] and Dewalt Beaver, of Treddyffrin township, Chester county, both of the state aforesaid, guardians duly appointed for the minor children of Adam Siter, deceased, the sum of three thousand two hundred and seventy-one dollars and ninety-two cents; in consideration whereof, and for the love and regard which I have and bear towards my wife Ann, and child Mitchel Jordan, together with other good causes me thereunto moving, do hereby, and by these presents, assign, transfer, set over, convey, and dispose of, all my right, title, claim, and demand whatsoever, of, in, and to the residue of my share which I claim through my wife, out of the estate of my late father-in-law, Adam Siter, deceased, together also with my mother-in-law's dower after her decease, (excepting and reserving only as is hereinafter reserved and excepted,) unto Edward Siter and Dewalt Beaver, hereinbefore mentioned, in trust, and for the uses and purposes as followeth, that is to say, the aforesaid Edward Siter and Dewalt Beaver, for the trust and confidence placed in them, do hereby bind themselves, their heirs, executors, and administrators, to pay the interest annually arising from the residue of the aforesaid share and dower, unto my wife Ann Jordan, for her use and support, as also for bringing up and supporting our son Mitchel, for and during the natural life of the said Ann, and after her decease, to our said son Mitchel, if he should be of age at the decease of the mother, or as soon as he arrives to the age of twenty-one years, the principal; and for the better securing the residue of the aforesaid share for the uses and purposes hereinbefore mentioned, I do hereby, for myself, my executors, and administrators, assign, transfer, set over, convey, and dispose of the same unto the aforesaid Edward Siter and Dewalt Beaver, their heirs, executors, and administrators, in trust, and for the uses and purposes hereinbefore mentioned. In witness whereof," &c.

After the execution of this deed, the husband, who was previously intemperate, and had squandered the greater part of his wife's property, deserted her, and has not since been heard of. Subsequently to the lapse of the period prescribed by the act of assembly, as necessary to raise a legal presumption of his death, she intermarried with Hiram Taylor, the appellant.

On the 1st of April, 1807, Dewalt Beaver, one of the appel-

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lees, had in his hands seven hundred and twenty-five pounds eight shillings and ten pence, part of the estate of his ward. Edward Siter, the other appellee, and one of the children of the decedent, had previously accepted for himself, a messuage and one hundred and sixteen acres, called the Eagle property, parcel of the real estate, appraised at sixteen thousand eight hundred dollars, and given bonds to the other children for their portions of the valuation money. William Siter, another child, had accepted the residue of the real estate, given bonds likewise to the other children, and conveyed the part so accepted by him to Edward, who had assumed all the responsibilities incurred by the acceptance of it. Edward being thus indebted for the real estate, on the 1st of April, 1807, was charged by himself and [*470] *his fellow guardian in the guardianship book of entries with the moneys due to their ward on the bonds given for her portion of the valuation money. The appellees continued to charge themselves on the guardianship account with moneys received, and to credit themselves for moneys paid out, after the execution of the deed of trust, by entries made at various times, till the book was closed on the 1st of April, 1818. The widow was living at the execution of the deed of trust.

The estate of the wife, consisting at that period of choses in action, had therefore not been reduced to possession by the husband, a part of it being actually or potentially in the hands of the appellees to whom the deed was made, and the residue secured by bonds receivable at the death of her mother. The question was, whether the deed of trust passed no more than the husband's right of reduction into possession during his lifetime; or whether it passed the interest of the wife, and consequently entitled the trustees to retain for the purposes of the trust after his death.

The cause was argued by December Term last, by *Cohen* and *Kittera* for the appellant, and by *Dillingham* for the appellees. The court having ordered a re-argument it was argued again at this term, by *Cohen* (with whom was *Kittera*), on behalf of the appellant.

Bell and *Dillingham* for the appellees were relieved by the court, whose opinion was delivered by

GIBSON, C. J.—The objection to this settlement is rested on the authority of *Hartman v. Dowdle*, 1 Rawle, 279, which requires a valuable consideration for the contract of equitable assignment, in order to bar the wife's survivorship. It certainly was decided there, and on indisputable authority, that an equita-

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ble assignment is executory, whether it purports to be an agreement or a conveyance of the title ; and that it is not to be executed in favour of a volunteer, against the conjugal rights of the wife. But would a chancellor withhold his assistance from what this palpably is, a settlement for the advantage of the wife herself, and in restraint of the husband's power to squander the fragments of her estate ? That it is not for her exclusive benefit, but for that of her child also, is no obstacle to the execution of it ; for where a provision is ordered out of the equitable choses of a wife, though the equity which is the foundation of it is inherent in her person and not a separate ground of claim by her children after her waiver of it or death, the children are nevertheless included. This is a reasonable settlement, out of the wife's own property, on herself and her child : and it would be a narrow construction of the marital powers of the husband, that would suffer the trust to fail for an omission to reduce the fund into actual possession before the execution of the instrument. The decision might be rested here ; but as the soundness of the decision in *Hartman v. Dowdle* is questioned in relation to cases even where there is in fact a valuable consideration, it is perhaps necessary, but certainly proper, *to [*471] examine the principles started in *Hornsby v. Lee*, 2 Mad. 16, sustained in *Purdon v. Jackson*, 1 Russel, 1, and followed in *Honner v. Morton*, 3 Russel, 298 ; as it is upon the authority of these cases that the question is made. And this seems the more necessary, as these decisions, not being quotable as precedents here, and consequently not being open to the scrutiny of counsel, might otherwise make a false impression on the mind of the profession. The worst consequence of the act to exclude British precedents since a particular period, is, that they sometimes pass with the judges for more than they are worth. They are always examined at the chambers of the judges ; and the object of the act is certainly not promoted by refusing the party to be affected by them an opportunity to contest their principles. Certainly they ought to have no authority here as precedents, and the inclination of the judges to regard them as such has passed away ; but they are entitled to consideration for whatever of reason and sense they contain, and they might in that respect be safely put on a footing with other European decisions. Where, however, they happen to be unfounded in principle, the judges can do no better service to the cause of jurisprudence, than by pointing it out. In weighing the arguments in support of these three decisions, then, it will be necessary to try them by their consistency with general principles and with other decisions of the same court.

In considering the question on the ground of authority, I will

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first state those *dicta*, for there was no decision of the point previous to *Hornsby v. Lee*, which might seem to make in favour of the wife. But it is proper to premise, that there is a class of cases usually brought into the discussion, which are inapplicable to anything but an entirely different subject—her claim to a provision out of her equitable choses in action which, laying originally in the exclusive jurisdiction of the chancellor, enable him to set what price he pleases on the equitable assistance necessary to the husband in order to get at them. Of these, the chancellor may settle a part or the whole on the wife, according to her necessities or his own notions of propriety, though it is to be admitted, that the residue after provision made, is usually disposed of in analogy to her rights over her legal choses. But the right to her equitable choses is founded, not on her survivorship, which is a legal title of which she cannot be deprived, even by her consent signified in court, but on the chancellor's discretion; for she may urge it against the husband himself, on what is called "the wife's equity;" and these equitable choses therefore differ from her legal choses, which the husband, or his legal assignee, may recover without equitable assistance, but which, when only equitably assigned, require the help of a chancellor, to put the assignee in the place of the assignor. For this last quality, they also, are sometimes, but improperly, called the wife's equitable choses in action, as by Mr. Roper, in his treatise on property, though he subsequently considers her equity as appertaining to choses for the recovery of which there is no legal remedy in the husband's [*472] name, or that of any one else, and not to cases in which the assignee is the equitable owner of a legal title. Of this class is *Like v. Beresford*, 3 Ves. 512, where an assignee, though for value, was postponed, because there was no legal ownership on either side to control the chancellor's discretion. Many others of the same stamp are occasionally brought into the argument, with no other effect than to add entanglement to complexity. I therefore dismiss them to turn to those which touch the point more nearly.

The earliest of them is the well-known case of *Burnett v. Kingston*, Prec. in Ch. 118, in which the Lord Keeper is reported to have said, that "if a husband assign a bond of his wife for a valuable consideration, this assignment will not bind the wife if she survive; for the wife claims paramount." This, however, was not the point decided, the settlement being in fact a voluntary disposition, which is conceded on all hands not to bind the wife, even if it binds the husband; and beside, the report of the same case in 2 Vern. 401, has no such *dictum*. The next is *White v. St. Barbe*, 1 Ves. & Bea. 405, which contains what

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might be thought an intimation to the same effect, deducible from the generality of an assertion made by the Master of the Rolls, Sir William Grant, that the husband can dispose of his wife's chose in action "against every one but the wife surviving." This also was but a *dictum*, and it will be seen by other *dicta* of the same able judge, that he supposed the generality of the rule might be qualified by the nature of the consideration. These two *dicta*, with perhaps a doubt thrown out by Lord Hardwicke, in *Ives v. Medcalfe*, 1 Atk. 63, and *Bush v. Delway*, 1 Ves. Sr. 19; 3 Atk. 330, make up the sum of authority to be brought in aid of the two decisions of Sir Thomas Plumer in *Hornsby v. Lee*, and *Purdon v. Jackson*; and that of Lord Lyndhurst, in *Honner v. Morton*, 3 Russel, 65.

It has been said that no case can be found in which the contrary was directly decided as to the immediate point of the cause. In *Atkins v. Dawbury*, Gilb. Eq. Rep. 88, it was directly determined that even a voluntary assignment binds the wife; and though it is to be admitted that the doctrine was carried beyond the principle which regulates equity in the execution of such agreements, the decision clearly evinces an opinion favourable to the general power of the husband. However, in *Bates v. Dandy*, 2 Atk. 207, the precise question arose, and was decided as the turning point of the cause. Two mortgages, handed over to the husband of an intestate's daughter by the administrator, pursuant to an amicable distribution of the estate, were delivered by the husband to one from whom he obtained money, on an agreement to assign them; but they were not legally assigned, either by the husband or the administrator. From the opinion of Lord Hardwicke, appended to *Honner v. Morton*, 3 Russel, 301, it appears the wife was the sister, not a daughter of the decedent; and that she claimed, not through an intestacy, but as one of three residuary legatees—a difference not material to the question. The husband *dead, the assignee [*473] brought a bill against the wife and the husband's administrator, to be paid his money or have the mortgage foreclosed, and Lord Hardwicke established his right to the extent of the money advanced, expressly because the husband's equitable assignment barred the wife's title to the extent of the consideration. It cannot be said that this is not a case in point, because the chancellor sustained the wife's title to the surplus against the husband's administrator. That barely proves that he executed the assignment no further than there was value to support it, leaving it, as regards the residue, to its legal consequences between the wife and her husband's representative. The case is undoubtedly in point, and one of the highest authority; in addition to which, we have a recognition of the principle by

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the same judge, in *Grey v. Kentish*, 1 Atk. 280, and *Hawkins v. Obyn*, 2 Atk. 549; by Lord King in *The Duke of Chandos v. Talbot*, 2 P. Wms. 608, and *Carteret v. Paschal*, 3 P. Wms. 200; by Lord Bathurst in *Gayner v. Wilkinson*, Dickens' Rep. 491; by Lord Thurlow in *Saddington v. Kinsman*, 1 Bro. Ch. 51, and *Worral v. Marlar*, 1 P. Wms. 459 (note); by Lord Alvanley, in *Hewit v. Crowcher*, cited in 12 Ves. 175, and *Gregg v. Crowcher*, 1b.; by Sir William Grant, in *Mitford v. Mitford*, 9 Ves. 100; by Mr. Butler, in his note to Co. Lit. 351; by Mr. Roper, Mr. Clancy, and every respectable text writer without exception. Sir Thomas Plumer considers the dicta in these cases as referring to the husband's power to assign his own personal right of reduction into possession, and not his wife's title; but they are apparently predicated without restriction of meaning, and contain nothing which would seem to give colour to that construction of them. In *Grey v. Kentish*, Lord Hardwicke spoke expressly in reference to the husband's power to assign the wife's possibility as well as his own. It is true that Mr. Clancy considers an assignment of her possibility or reversionary interests as inoperative, and treats the two decisions of Sir Thomas Plumer as authority for that; but it will be seen that those interests and her choses presently reducible into possession, stand on the very same principle. The American authorities are equally clear for the assignee. The doctrine of *Bates v. Dandy* is broadly asserted by Chancellor Kent, in *Schuyler v. Hoyle*, 5 Johns. Ch. 207; and in his Commentaries, vol. 2, 137, he says, the doctrine is understood to be a settled rule. I presume he means that it is so in this country, for he admits it to have been disturbed by the recent decisions in England. It is also asserted to be the rule by Chief Justice Savage in delivering the opinion of the Court of Errors in *Udall v. Kenney*, 5 Cowan, 597; and by Justice Washington, in *Krumbaar v. Burt*, 2 W. C. C. R. 406. These cases, with *Hartman v. Dowdel*, 1 Rawle, 281, make up the sum of authority to be found in the American books. Of the last it becomes me not to speak further than to say, that I discover nothing in it tending towards the impression received from it by Chancellor Kent, as expressed in a note to the page of his Commentaries already quoted, that the judge who delivered the [*474] opinion of the court, entertained a doubt of the principle even of *Bates v. Dandy*. However the opinion of the court may have been expressed, it certainly was intended to rule the cause expressly on the distinction between a voluntary assignment and one for value. It will be seen, therefore, that Sir Thomas Plumer stood single and opposed to every other judge or writer who preceded him; and to run counter

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to such a current of authority for the sake of a theoretic principle, would seem to require the principle to be self-evident and its obligation to be irresistible.

But what is this principle? It is that the law, having declared the marriage to be a gift to the husband of the wife's choses in action, but on condition that he reduce them into possession during the coverture, is so uncompromising in exacting a performance of the condition, as to preclude him from exercising without it, not merely a power of his own over any supposed interest of his own, but the wife's power and dominion over her title, of which the marriage has made him the depository and the instrument: and that though he has incontestably succeeded to her power and dominion by the incorporation of her civil existence with his, and possesses them as the representative of her person, as amply and effectively as she possessed them, yet that he cannot exercise them to transfer her title, but only his own incidental and derivative power of reduction into possession, to be exercised by the transferee, as he himself might have exercised it, during the coverture. This is the entire foundation of the hypothesis; and if it give way, the hypothesis must give way along with it. Now whatever may be thought of the husband's succession to his wife's title before reduction into possession, his succession to her personal power and dominion will not be contested. Sir William Blackstone having said, "that the chattels which formerly belonged to the wife, are by act of law vested in the husband, with the same powers as the wife when sole had over them," proceeds to say, that "this depends entirely on the notion of a unity of person between the husband and the wife, it being held that they are one person in law, so that the very being and existence of the wife are suspended during the coverture, or entirely merged or incorporated with that of the husband." 2 Com. 483. If then, as it is said, he has the same power over the chattels that she formerly had, it is not a little singular that the law should have capriciously restricted the exercise of it to mere reduction of them into possession, when she herself might have transferred her title to them without such reduction. Such a restriction would be merely arbitrary, and destitute of that reason which is said to be the life of the law. It is true, the learned commentator adds, that he shall not have her choses in action, "unless he reduces them to possession by exercising some act of ownership over them." Is not a transfer of them, whether legal or equitable, an act of ownership? and do not the expressions of the commentator show, that he had in view a reduction into possession, not of the thing, but the title to it? This reduction, it seems, may be effected by the

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[*475] husband as the representative *of his wife's power, not merely by the occupancy of the thing, but by any other act which asserts a new and distinct ownership, under what was formerly her title. Public policy, founded in convenience, and the fluctuation of trade, requires that the dominion over chattels should not be in abeyance; yet it would always be so to some extent, and, in the case of a chose depending on a long credit, might be so for years, if the recovery of it were a condition precedent to the vesting of a disposing power over it. To what end make possession of the thing an ingredient in the transfer of the title to it? That it is necessarily so in the transfer of a chose in action, which is a subject of legal assignment, will not be pretended. Yet it seems to have escaped those who maintain the hypothesis, that to carry it out, would require the wife's survivorship to be sustained even against a legal assignee—a proposition that would not bear a moment's examination. The husband's indorsement of her promissory note passes every vestige of her property in it, as does his assignment of her mortgage, though the mortgaged term be not in possession, or her interest in an *elegit* sued out on a judgment recovered by her when sole; because all these are assignable at law. *Grute v. Locroft*, Cro. Eliz. 287; *Carteret v. Paschal*, 3 P. Wms. 200. And he might undoubtedly pass her interest in a bond, assignable by force of our act of assembly. By that act, a bond expressly payable to assignees, may be assigned so as to give an action in the name of the assignee; but where it contains no such clause of payment, the action must be in the name of the obligee, as a trustee. The difference as to the title of the assignee, has been hitherto considered as but formal; but it would be substantial, if a husband could part with, as own, his wife's interest in her bond, containing such a clause, and yet be able to part with no more than a naked power without it. For the want of such a clause, the property might be tied up for twenty or more years, if the original credit had so long to run. "When the husband assigns his wife's chose in action," asks Sir Thomas Plumer, "does the thing assigned continue to be a chose in action or does it become a personal chattel in possession? If it does not continue after the transfer to be a chose in action, what makes it cease to be so? A chose in action, cannot cease to be a chose in action, but by being reduced into possession." No one doubts it, but what has that to do with the husband's power to transfer it as the representative of his wife's person? If reduction to possession were at all necessary to the exercise of this power, his questions might be turned against him, with irresistible effect. Is a chose in action, the less a chose in action, for having been legally, instead of equitably assigned?

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And if reduction into possession, instead of the payment of a consideration, be indispensable in any case to give the assignee the property, why not in that? To escape from the dilemma presented by these inquiries, it is necessary to assert, what Sir Thomas seems to admit, that an assignment may, in certain circumstances, be a sort of reduction into the possession of the assignee. If by that is meant a possession of the thing, *and not of the title to it, the assumption is a mon- [*476] strous one; and to admit that a reduction into possession of the title, is all that the law requires, is to surrender the argument. But granting, for the sake of the argument, that a legal assignment of the title, is a constructive reduction to possession of the thing, it is not easy to comprehend how an assignment can be more so, when it transfers the legal, than when it transfers the equitable title; or why the wife's survivorship should be controlled by it in the one case, and not in the other. The truth is, that the notion of the possession of the thing, as a condition precedent to the vesting of the wife's dominion in the husband, as the representative of her person, is one of those things that have passed current in the world, for want of attention to detect it. Marriage is in strictness not an immediate gift of the wife's chattels, whether in possession or in action, though it is so in effect, the suspension of her capacity to exercise a dominion over them, and the transfer of it to the husband, as the necessary consequence of the blending of their persons, putting it in his power to assume her title, or transfer it to any one else. Her civil existence enters into, and is consolidated with his, so that they form but one person; but it enters attended with all the individual powers and capacities, which before resided in her person separately, to be exercised thenceforth by him, through whom alone she can speak and act. That he succeeds to all her personal capacity, is proved by her marriage, when she happens to be an administratrix, which devolves on him the business of the administration, and enables him to act in it without respect to her assent or concurrence, and it is his succession to this capacity that enables him to exercise her personal right of election, under our intestate acts, and thus to divest her title, even to her land. But her title to her choses in action, continues to reside in her natural person, notwithstanding the transfer, to that of her husband, of the power necessary to exercise the dominion incident to it; and, on a dissolution of the union, follows her person, or goes to the representative of it, unless it has been divested by the husband, while the power to do so resided in him. Her term for years, in which the marriage gives him an anomalous interest along with her, is an exception to this, and the only one, that goes

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indifferently to either surviving, in analogy I presume to joint tenancy. But to divest her title to her chattels personal, any act, it will be seen, is sufficient which evinces a present purpose to do so. As regards her chattels in possession, nothing further is necessary to make them his, than the possession itself, which, when unexplained by circumstances, is essentially an index of ownership; and of an ownership necessarily exclusive, as she is destitute of capacity to possess them or use them in any other character, than that of his agent or servant; consequently his use or possession of them, is to be taken as under the new title which his power may create. It will be seen, however, that even possession will not amount to an assertion of title, where it is not intended to have that effect. But it does not follow, because mere occupancy is sufficient to constitute a new title when so intended, that it can be constituted in no other way. [*477] Succeeding *to the personal capacity of the wife, and becoming the organ of her power, he may dispose of the subject of it, as she herself might have disposed of it. The inquiry, then, how the assignee of the husband can have any other or better title than the husband himself had, will be found to rest on no better foundation, than would an inquiry how the grantee of an attorney can have any other or better title than the attorney himself had. The question is pointless, when it is considered that the husband is invested with, not merely a subordinate attribute of the wife's ownership—the power of reduction into possession—but with full dominion over the property; and that his assignment of it transfers, not this subordinate attribute, but whatever she has, by his instrumentality, capacity to part with. That he has such dominion, is proved by his power over her choses in action susceptible of legal assignment. A legal assignee may indeed sue on his own title while an equitable assignee cannot; an action at law being maintainable only on a legal title; and hence Sir Thomas Plumer seems to consider as conclusive of the right, that a chose equitably assigned, can be reduced into possession, by an action only in the name of the wife. To say nothing of what is manifest at a glance, that the objection, if available at any time, would be equally so in the lifetime of the husband, it is necessary but to remark, that the conclusion rests on the assumption of ground not to be conceded—that the beneficial interest is inseparable from the legal title. That it is otherwise, is proved by the property which the representative of a deceased partner has in the joint effects, though an action to recover them lies only in the name of the survivor; and from this it may be conceived, that the wife's beneficial interest can pass, though the assignee have no remedy to recover it but by an action in her name. It is the practice of every day

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to use the name of the original owner, with or without his consent, where the equitable has been severed from the legal title. I am aware that reduction into possession, is generally, if not universally, said by text writers, to be a condition of the husband's ownership; and so perhaps it is, as there is scarce any other means of exercising his general power of disposal, so as to transfer the title to himself; at least such, in a countless majority of instances, is the means pursued. Hence, by mistaking cause for effect, from frequency of recurrence in a particular way, the mind is led to contemplate possession as the criterion of the right, instead of a means of acquiring it. Instances however will presently be given of its having been acquired by means short of possession. But the fallacy consists in taking for granted that the title must be first vested in the husband, to enable him to convey it to another, without considering that an authority uncoupled with an interest, would equally enable him to do so.

There are other cases than those of legal assignment, which it is impossible to reconcile to the criterion of possession, or to each other, on a foundation so narrow. I have said that the actual possession of the husband, does not bar the wife's title, where it is not intended to *have that effect. In *Baker v. Hall*, 12 Ves. 497, her ownership was not displaced [*478] by his receipt as her trustee, because, as it was expressed, "the husband must be considered as having entered into possession as a trustee and executor of the will, and not as a husband; and therefore the wife's share of the residue could not be deemed sufficiently reduced into possession, so as to prevent its surviving to her on his decease, and of course going upon her death to her representative." Would it not have been better to say, that he did not sufficiently appear to have acted by virtue of the power in him, with a design to make himself master of her title. That it is not the degree of possession, but the quality and object of it which is material to the question, is shown by *Wall v. Tomlinson*, 16 Ves. 413, in which it was said, "that the transfer of the wife's stock to the husband merely as trustee, could not be represented as a reduction into possession that would entitle his representatives. It was made *diverso intuitu*." On the same principle, is the decision in the matter of *Miller's Estate*, *Ashmead's Rep.* 323, and the cases in *Dessaussure's Reports*. Thus, we see, it is not the taking of possession which, though usually an unequivocal act of ownership, may yet be qualified by circumstances, that gives a new direction to the title, but the assertion of a title distinct from, and independent of that of the wife, of which possession is but evidence. Yet if the act of entering into possession were even the modal performance of a legal con-

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dition, it would be attended with all the legal consequences of essential performance in respect to the vesting of the title depending on it, without regard to the motive for the entry, whether it were to agree to his own title, or disagree to that of any one else. It would seem, therefore, to be actual disposition, inconsistent with the wife's title, and not the abstract effect of possession of the thing, which is but a specific means of effecting such a disposition, that is the criterion. If actual reduction into possession as husband, were the exclusive means of divesting the wife's title, a husband already in possession as a trustee, would be destitute of power to vest it in himself, or transfer it to another; for I know of no act to be done as an equivalent. I proceed to instance a few more cases that cannot be reconciled to the criterion of possession.

In an action to recover her chose acquired when sole, she must be joined. But she may be joined or not, where the chose has come to her since the marriage; and when the husband sues alone, the judgment bars her survivorship, because the recovery stands on his title. But even a joint recovery, though apparently on her original title, divests it, and creates a new title in its place, which survives to the one or the other of them on the principle of joint ownership. *Oglander v. Batson*, 1 Vern. 396; *Garforth v. Bradley*, 2 Ves. 676. On the same principle is *Woodyer v. Gresham*, 1 Salk. 116, where the husband and wife had sued out a *scire facias* in their joint names on the wife's judgment recovered when sole, and had an award of execution, after which the wife died; and it was held that her original title by the recovery of judgment, was supplanted by the joint award [*479] *of execution, which of course was held to survive to the husband. Yet there was no pretence of reduction into possession; for it was admitted that execution could issue but on the original judgment, the award of it on a *scire facias* not being there, as it is here, a judgment *quod recuperet*. And in this respect, a recovery in chancery follows in its consequences a recovery at law, an order of payment to the husband alone, or to the husband and wife jointly, having the same effect to create a new title and displace the old one. *Heygate v. Annesly*, 1 Bro. C. C. by Eden, 362; *Forbes v. Phipp*, 1 Eden, 503. But mere payment into court without such order will not have that effect, as appears by *Phipps v. Anglesea*, 1 Fonb. 89, and *M'Cauley v. Phillips*, 4 Ves. 15; nor will a decree barely declaring the money to be the property of the husband and the wife. *Nanney v. Martin*, 1 Ch. Ca. 27; *Carr v. Taylor*, 10 Ves. 578, and *Richards v. Chambers*, Ib. 580. And the reason of the difference seems to be, that an order to pay, operates on the title like a judgment which concludes the right, while a decree but

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declares the right as existing by force of the original title. Now, in all the preceding cases, the judgment or order left the chose specifically outstanding, so that reduction of it into possession was not pretended; yet the title was changed and undoubtedly by force of the husband's control of it through the medium of the courts; they consequently evince in him the existence of a disposing power over the wife's chattels while they are yet in action. That he is the recipient of her power and capacity to act in the disposal of them, is proved by the fact itself, that he has power to reduce them into possession; for if he may exercise an ownership by that means, why may he not by any other which indicates an intent to give effect to his power, or why should the law be supposed to have restrained the exercise of it to one arbitrary mode of action? But the existence of a general power of disposal, independent of property in himself, is conclusively proved by his undoubted power to release the title to her chattels before they are actually reducible into possession, and consequently before he could gain a property in them; which, implying as it does, the highest grades of dominion, could spring from no other source. But that he has a power to dispose of her chattels independent of a beneficial interest in them of his own, is proved by his power over assets of which she is but the executrix, in which he has no such interest even when in his possession.

If, then, he succeeds to the power of disposal that was in her, why may not his sale of her property in action, be as effectual to pass the beneficial interest in it, as if it were made by herself when sole? Where the legal title has passed, we have seen that objection by her is waived or disregarded; and where the contract requires the assistance of a chancellor, it is difficult to imagine an equity on her part to defeat the acts of her representative, in the benefit of which she and her children have participated. It never has been pretended that her survivorship depends on a specific equity, or that it is anything but a legal title. It is agreed that equity will execute, if for [*480] value, an assignment of a legal chose in action against the husband himself; and if the wife has no specific equity to countervail the equity of the assignee and by that means give a preponderance to the legal title, there is no reason why the contract should not be executed against her also. An execution of it against the husband is necessarily an execution of it against the wife, because when executed, it has the effect of a legal assignment. Why, then, should there be a difference in substance in the first instance? I am unable to see why he may part with her property by the one sort of contract, and not by the other, as she herself might have done. The fallacy

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of the doctrine seems to consist in a notion that the husband's power extends no further than to the performance, but not in a representative capacity, of certain specific acts in relation to it; and this notion is rested, among other things, on the restricted operation of assignments in bankruptcy and insolvency, which however will be found to rest upon the peculiar principles of an arbitrary system.

The spirit of the bankrupt laws is policy, not justice. The object being to encourage trade by procuring payment of mercantile debts out of any fund within the bankrupt's control, without regard to the interests of others; those laws are deaf to the claim of his family in respect to interests which he has even a naked power to control. Thus the 1 Jac. 1 declares that the assignment "shall bind issue in tail, and all others whom the bankrupt may by a common recovery cut off;" and by the 3 G. 4, made perpetual by the statute called the New Act, it is provided, that the assignment shall be equivalent to the execution of a general power of appointment to uses, in order to give the estate to the creditors; and the same spirit dictated the effect originally attributed to it by the courts, in relation to the wife's choses in action. Notwithstanding the assignment is not the act of the husband, but of third persons—of the commissioners in cases of bankruptcy, and of the clerk of the peace in cases of insolvency, or, in both cases, more properly of the law which imparts to it, and regulates its effect—it was held to be *ipso facto* a divesture of the wife's title, as if it were the husband's own act, and a spontaneous exercise of his power. On abstract principles it might have seemed that though the power is a valuable one, yet that the exercise of it pertains, by its nature and origin, to his individual volition, and not to the volition of his creditors or their representatives, who have no moral, or expressly legal right, to require him to despoil his wife for their benefit. These have no other equity by the bankruptcy than they had before it; and certainly none against the wife, on the credit of whose outstanding property the debt was not contracted. The palpable injustice of these decisions induced Sir William Grant, in *Mitford v. Mitford*, to depart from them to a certain extent, not however by taking his stand upon principle and entirely protecting the title of the wife, as it seems to me he ought to have done, but by taking a middle course and allowing the assignment to pass the incidental right of reduction into possession as the husband had it, and subject

[*481] *to the same limitation, as to time, in the exercise of it. The adoption of this principle, which gives the wife's title a chance of preservation, is certainly in mitigation of the earlier decisions; but it will probably be found of little

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value in practice, as creditors are usually sufficiently prompt to seize upon all that can be brought within their reach. What is more to the purpose, is, that the decree was founded on no analogy drawn from the effect of a spontaneous assignment by the husband; for Sir William Grant expressly distinguished between an assignment by operation of law, which puts the assignees exactly in the place of the bankrupt, and a particular assignment for a specific consideration which was admitted by him to pass the wife's choses in action so as to bar her survivorship. The foundation of the difference cannot be that the assignment of the law transfers but an incipient title; for viewing the bankrupt as the owner of an interest and not as the instrument of his wife's power, his own assignment could transfer no more. But there cannot be even an inceptive title in him consistently with the existence of a title in the wife; and what does she ever take by survivorship? Not a new title acquired by the event, but the old title which all along resided in her; the capacity to use it, and not the title itself, being regained by the dissolution of the union. If, then, he had a title, he would have it concurrently with the wife; and the property would survive indifferently to either, on the principle of joint tenancy. Yet he is entitled but as her administrator and can recover her choses in action in no other character. Neither is the difference to be attributed to the want of a valuable consideration; for the effect of the certificate in releasing his person and future earnings, would afford a decisive answer to that. It is evident, therefore, that the learned and able master of the rolls founded his judgment, not on the abstract nature of the husband's interest or power, but on the general scope and tendency of the bankrupt laws, tempered by an infusion of humanity and justice. In our own state, the assignment of an insolvent debtor, being his own deliberate act for the recovery of his liberty, and therefore for a valuable consideration, is treated as, what it is in fact, a spontaneous transfer of every interest which he had power to part with. On this principle is *Rechwine v. Heim*, 1 Penn. Rep. 373, which may therefore be added to the list of authorities already given.

A distinction has been attempted between choses presently reducible, and possibilities or reversionary interests. Indeed, *Purdon v. Jackson* seems to be founded on it, and it is expressly taken in *Honner v. Morton*; yet it is ingenuously admitted by Mr. Clancy who adopts it, that the arguments to sustain the assignment as to the one class, are equally operative to sustain it as to the other. In fact no attempt has been made by any one to found it on principle; nor could there be, for the elementary principle relied on in *Purdon v. Jackson*, or the one

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brought into view in the present case, would alike dispose of it [*482] as to both. If it be conceded, as it seems to me it *must, that the husband may release his wife's possibility if it be capable of taking effect during the coverture, it will follow that his assignment of it would equally divest her title. A power to release, implying, as it does, the highest grade of dominion, can spring from no other source than a general right of disposal. It is in this respect analogous to a general power of appointment to uses, which is equivalent to a limitation in fee, because it enables the donee of the power to give the estate as he pleases. It would be strange, then, if a source which maintains a power to release, were insufficient to maintain a power to assign even a possibility, which has been an admitted subject of release ever since the determination of *Theobalds v. Duffoy*, 9 Mod. 102; and if the wife might have released her possibility, it were equally strange if the husband could not release it for her. But here again we are met with an assertion that whatever has been said of the husband's power to release, is to be understood, not of the wife's title, but of his own contingent interest in it. Whatever is found in the books, however, is clearly predicated of his power over her possibility and of his capacity to bar her title. In the Anonymous Case in 2 Roll. 134, it is indeed said that the husband has an interest which he may release; but it is evidently an interest in right of his wife, which he may release in right of his wife. The expression of Lord Holt in *Gage v. Acton*, relates expressly to the title of the wife. "Where," said he, "the wife hath any right or duty which by possibility may happen to accrue during the coverture, the husband may by release discharge it; but where the wife hath a right or duty which by no possibility can accrue to her during the coverture, the husband cannot release it." 1 Salk. 327. It is said by Lord Lyndhurst in *Honner v. Morton*, that *Lampet's Case*, 10 Co. 46, cited by Lord Holt for this, "does not support the position in the unqualified way in which he states it." I am unable to see wherefore. The husband released so as to bar his wife's survivorship, her contingent or reversionary interest in a term for years dependent on a precedent interest for life; which seems to come entirely up to the point. But it is said in a note to *Purdon v. Jackson*, that *Lampet's Case* lends no support to the position of Lord Holt, because the decision proceeded expressly on the ground that "such possibility of the wife might be extinguished by grant or release to him in possession," but that "such future or executory interest could not be granted to a stranger during the life of the first devisee." In a court of law which recognizes no title but a legal one, it would have been strange had it been held

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otherwise; and the same remark is applicable to the passage from Shepherd's Touchstone. But Lampet's Case in fact does support Lord Holt's assertion to the very letter; for he spoke not of the husband's power to grant, but to extinguish. He is also fully sustained by Mr. Butler, Co. Lit. 351, a, note 304. It is true Lord Holt was in a minority as regards the point of the cause; but the distinction taken by him is in striking coincidence with the position of the majority, that the intermarriage of an obligor with the obligee suspends, but does not extinguish, a *bond payable after the expiration of the coverture. [*483] Why does it not? Evidently because there is no greater union of persons and consequent absorption of the wife's existence in regard to such a bond, than there is in regard to a contingency, or possibility that cannot happen or take effect during the coverture; and the wonder therefore is that the principle of Lord Holt did not conduct him to the conclusion reached by his brethren. But as regards all beside, this union, which vests in him all the personal capacities and powers of the wife, gives him the capacity and power to do whatever she could do were she sole. And this principle not only reconciles the cases to each other, but relieves us from the awkwardness of explaining them on principles essentially different, by sometimes adopting the notion of a fictitious reduction into possession, and sometimes rejecting even the circumstances of actual possession. If the husband is taken to be the depositary of his wife's power, but not of her title, except when incidentally acquired by an exercise of that power, there will be no discrepance of principle or decision whether as to choses presently reducible, reversionary interests, or bare possibilities: for the question in respect to each of them, will be brought to this: does a contract of assignment for valuable consideration, entered into by a *feme* through the agency of her legal representative, bind her in a court of equity? I am of opinion that it does, and that the distinction attempted between vested and contingent interests, has no place in our law.

Independent of this, there is an ingredient in this case which seems to oppose an insuperable barrier to the title of the second husband. Had actual payment been made to the first, the validity of his assignment could not have been contested; and if the trustees, standing in his place, are to be treated as possessed under the trust, there is an end of the question. On what ground is their possession, as trustees, to be disputed? To have handed the money across the table as guardians, in order to receive it back as trustees, would have been a useless and an idle ceremony. Where the same hand is to pay and to receive, the transfer is made by operation of law: as where an obligee makes

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the obligor his executor, the debt is presently assets, because, though the action is gone, the making of him executor amounts not to a legacy, but payment and a release. *Needham's Case*, 8 Co. 136; *Wankford v. Wankford*, 1 Salk. 306. So in the *Trustees of Jacobs v. The Executors of Jacobs*, not yet reported, it was held that executors who were also trustees of a legacy, possessed it in the latter character; and in *Fryer v. Gildridge*, Hob. 10, where the obligor had made the executrix of the obligee his executrix, the debt was held to be presently paid by way of retainer, so that no new action could be had for it, because a personal right of action once suspended is gone forever. To the same effect is *Griffith v. Chew*, 8 Serg. & Rawle, 17, and *Thomas v. Thompson*, 2 Johns. 473. Were it necessary to resort to it, this last principle would be decisive; for it will [*484] not be pretended that the first husband could *have maintained an action against the terms of his own deed, and it is plain the wife could not have sued separately by reason of the disability incident to her coverture. Had this deed been executed by the trustees, we should have had an ordinary case of extinguishment by the substitution of one security for another, on the latter of which a suit might have been maintained at law, just as it might be maintained on a bond for performance of the trust. But though there is no covenant for such performance, it is sufficient to give a remedy in equity that a trust has been declared. It is conceded that the trustees assented to the assignment; but that is not material, inasmuch as equity never suffers a trust to fail for want of a trustee, it being said, 1 Mad. Ch. 458, that where the trustees decline to act, the trust devolves on the court. On every ground, therefore, I am of opinion the settlement is a valid one, and that the decree be affirmed

Decree affirmed.

Cited by Counsel, 3 Wh. 418; 4 Wh. 127, 181; 5 Wh. 63; 1 W. & S. 255; 3 W. & S. 458, 477; 4 W. & S. 19; 6 W. & S. 298; 7 W. & S. 413; 2 Barr, 72; 10 Barr, 222, 374; 1 H. 563; 4 H. 369, 392; 6 H. 393; 12 C. 133; 4 Wr. 25, 41; 4 S. 480; 3 G. 44; 27 S. 484; s. c. 1 W. N. C. 527; 28 S. 422; 1 W. N. C. 442.

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1. An agreement to sell a chattel in an unfinished state, to be delivered at a future time, is an executory contract, for a breach of which an action for damages lies; but it does not pass the

property in the chattel. *Pritchett et al. v. Jones*, 260

2. Where, therefore, A. on the 31st of July, 1828, in consideration of a pre-existing debt, contracted to sell to B. a quantity of hides and skins, then in the vats of the vendor undergoing the process of tanning, but which were then capable of being removed, to be delivered on or before the 12th of the following November, some of them at fixed prices, and the rest at the market price, and to be passed to the credit of the vendor to settle his account, it was held, that no immediate property vested in the vendee, and that the leather was liable to execution as the property of the vendor, notwithstanding the transaction was open, and there was proof that it had long been the course of business for curriers in the city to purchase leather of tanners in the country, while in process of manufacture, to be delivered when tanned, and that advances were frequently made on such purchases, *Ibid*.

APPEAL.

See DIVORCE, 1, 2. ORPHANS' COURT, 5, 6.

ARBITRAMENT AND AWARD.

See PARTITION, 2, 6, 7.

1. Under a submission of all matters in variance between the parties, arbitrators have a right to make an award as to costs, though nothing be said about them in the submission. *Young v. Shook*, 299
2. In an action against a surviving obligor in a joint and several bond, it is not a good cause of demurrer to a plea of submission and award, that the parties to the submission were not only the parties to the action upon the bond, in which the plea is pleaded, but that one of the executors (erroneously called in the plea

- one of the administrators) of the deceased obligor, also joined in the submission, *Ibid.*
3. Under a submission of all matters in variance between the parties, involving the question whether a certain bond had been paid, an award, not under seal, discharging the bond, is good, *Ibid.*
 4. Where, in an action on a bond the defendant pleaded specially, that "all matters in variance between the parties" had been submitted to arbitrators, without any averment or allegation that the bond was the matter in variance, or formed any part of it, but the plea stated that the arbitrators made their award "of and concerning the premises and of and concerning the said writing obligatory," held, that it appeared upon the face of the plea, that the arbitrators had exceeded their power in passing on matters not submitted to them, and that the award was in this respect void; and that this defect in the plea might be taken advantage of by the plaintiff, either by replying *nul agard fait*, by pleading specially, or by demurrer, *Ibid.*

ARBITRATION.

See ARBITRAMENT AND AWARD. ERROR, 3.

Where a suit is commenced in this court by a writ returnable on the return day in July, the plaintiff cannot take out a rule of arbitration until after the first day of the following December term. *Dundas v. Bluden*, 463

ASSIGNMENT.

See MORTGAGE, 1. RECORDING ACT, 1, 2.

A drew a note for thirteen hundred and fifty dollars, for the accommodation of B., dated 21st of August, 1822, payable sixty days after date to C. or order, who indorsed it for the accommodation of B., who after indorsing it himself, got it discounted at the Bank of P., where he received the proceeds of it. B. by his agreement with the drawer and payee of the note, was to pay it at maturity. Before this time arrived, however, B. failed, and on the 13th of September, 1822, executed an assignment of all his estate to trustees, for the benefit of his creditors, on certain con-

ditions, one of which was to pay and discharge all the debts that were by him then due, or were owing, or growing due, to such of his creditors, as should within the space of ninety days, after the date of the assignment, if residing within the United States, and within six months, if residing elsewhere, execute a general release of all demands and debts whatsoever against him, paying such creditors their debts in full, if the estate should be sufficient for that purpose, and if not, paying them in equal and ratable proportions, according to the amount of their debts respectively. The assignor furnished to his assignees a list of his debts, including the note in question. On the 14th of September, 1822, A., the drawer, having also failed, executed an assignment of all his estate to trustees, for the benefit of such of his creditors as should within thirty days from that date, execute a release of their claims against him. These trustees were authorized to make compromises, or any other arrangements which they might think beneficial to the trust. On the 14th of October, 1822, at half-past nine o'clock, A. M., the Bank of P., the holders of the note in question, and other creditors of B., executed to him a full release, according to the provisions of the deed of assignment, of all debts and demands, and of all actions and manner of action, &c, which they then had, or thereafter might have, by reason of the debts to them respectively due, or owing, or growing due, from the said B. This release was executed, among others, by the assignees of A. On the same 14th of October, at ten o'clock A. M., the Bank of P. executed to A. a general release which had been procured for his creditors to sign, in compliance with the condition contained in his assignment, and had been executed about a week before by the assignees of B. The note fell due on the 23d of October, 1822, and was protested, of which notice was duly given to B., the indorser. On the 25th of February, 1823, the assignees of A. paid to the Bank of P. a dividend of ten per cent. on the said note. On the 26th of March, in the same year, notice was given to the Bank of P.

that the creditors of B. should send in their claims to his assignees, in order that they might declare a dividend. On the 25th of February, 1824, another dividend of ten per cent. was paid by the assignees of A. to the Bank of P. Two dividends were declared by the assignees of B., one of thirty-three and a third per cent., and the other of ten per cent. on the debts of the assignor, and the Bank of P. having brought suit against the assignees of B., to recover these two dividends, it was held :

- 1st. That B. was a competent witness for the plaintiffs to prove, that although A., was indebted to him on his private account in a small sum, and on their partnership accounts in a large sum, yet the note was not given or drawn on account of this indebtedness, but for the accommodation of the witness, with an understanding that he was to take it up when due, wherever he might get it discounted; and that he did not seek payment of the debt owing to him by A., because he knew from A.'s circumstances that he was unable to make it.
 - 2d. That the release of the Bank of P. to A. the drawer of the note did not discharge B. the indorser, and was therefore no bar to the plaintiff's recovery.
 - 3d. That the Bank of P were embraced by the terms of the assignment of B., though the debt owing to them was not due at the time of its execution, and that they were entitled to recover the dividends declared by his assignees.
 - 4th. That the rule for making a dividend, where more than one of the persons liable to the payment of a note or bill have failed, and made voluntary assignments of their property for the purpose of paying their respective debts and liabilities, is to take the amount actually due upon the note or bill, at the times respectively at which the first dividend is declared of each fund so assigned.
- Bank of Pennsylvania v. M Calmont et al., Assignees of Straubridge, . 307*

ATTACHMENT, DOMESTIC.

1. In an action by the trustees under a domestic attachment issued against A., brought to recover from B., the

father of A., the proceeds of the sale of goods in a store which had belonged to A., and the amount of debts due to A. collected by B., it is competent to the defendant to prove by the testimony of any disinterested witness, admissions, declarations, and acts of A. made or done at any time prior to the issuing of the attachment, tending to show, that he had given to his father the store and books of accounts, towards securing a debt which he owed to his father; notwithstanding A. was examined as a witness on the trial for the father, and testified to nothing having passed between him and his mother (who was alleged to have been his father's agent in this matter) on the subject of the store and books of account, and of his giving them up to his father, for any purpose whatever.

Ankrin v. Woodward et al., Trustees, &c., 345

2. But without any agreement between the father and the son, by which the latter assigned to the former the store, goods, and books of account, if the son before the writ of attachment issued, gave up to the father the goods and books for the purpose of enabling him to satisfy the debt due to him, out of the proceeds of the sale of the goods and the moneys collected, and the father, before the suing out of the writ, accepted them for that purpose, he would be entitled to have his debt satisfied out of the moneys arising from the sale of the goods and the collection of the debts, whether the debts were collected before or after the issuing of the writ of domestic attachment.
- Ibid.*
3. The trustees under a domestic attachment are only invested with those rights which existed in the person against whom it issued immediately before the writ is sued out, unless he before that time assigned or conveyed away his estate, or anything belonging to him for the purpose of defrauding his creditors; in which case the trustees have power, under the fifth section of the act of 1807, to recover and dispose of whatever may have been so conveyed away, in the same manner as if he had been seized or possessed thereof at the time of suing out the writ of attachment, *Ibid.*

ATTACHMENT, FOREIGN.

The recovery of a debt, in a *scire facias* against the garnishee, upon a judgment in a foreign attachment, is a bar to a recovery of the same debt from the garnishee by a person who took defence on the trial of the *scire facias*; provided such recovery was not the result of misrepresentation, fraud, or neglect on the part of the garnishee, or of collusion between him and the plaintiff in the attachment. *Coates v. Roberts*, . . . 100

ATTORNEY.

1. If a suit be brought under letters of administration founded on an administration bond, in which there is but one surety, and which therefore is void against a defendant who gives insufficient bail, of the entry of which the attorney of the plaintiff does not give him notice, and thus he is prevented from excepting to it, and after the defendant has absconded, judgment is obtained against him, an action may be maintained against the attorney for neglect of duty. *M'Williams v. Hopkins*, 382
2. And if the attorney in the suit brought against the attorney in the original suit, be guilty of a neglect of duty, a suit will lie against him, notwithstanding no valid letters of administration have been granted to the plaintiff; because the latter suit was for no duty owing to the intestate, but for an implied promise to the plaintiff himself, that his attorney would conduct his action with reasonable diligence and skill; and naming himself administrator, is surplusage, or at most matter of description, *Ibid*.

AWARD.

See ARBITRAMENT AND AWARD. ERROR, 3. PARTITION, 2, 6, 7.

BANK.

A bank in Philadelphia received on the 5th of October, 1826, from a mercantile house in the same place, one of the members of which was a director of the bank and conversant with its modes of doing business, two drafts, payable ten days after sight, upon two mercantile houses in Virginia, to be transmitted to a bank in Virginia for collection, with instructions as to the manner in which they were to be presented. The bills

were drawn by the house which deposited them to their own order, and they indorsed them. They were also indorsed by the cashier of the bank, with a direction to pay them to the order of the cashier of the Bank of Virginia. The day after they were received, the cashier of the bank in Philadelphia inclosed them in a letter directed to the cashier of the Bank of Virginia, in which he stated that "the bills are inclosed for our account." When they were received by the bank in Philadelphia, they were entered in short in the bank-book of the depositors. On the 28th of October, when a sufficient time had elapsed, according to common usage, the note clerk extended the bills in the books of the bank to the credit of the depositors, and a few days afterwards, at the request of the depositors, they were extended in their bank-book. On the 8th or 9th of April, 1827, the depositors were apprised, for the first time, of the non-payment of the bills, and this fact came to the knowledge of the bank in Philadelphia about the 26th of the same month. The bank-book of the depositors had in the meantime been settled seven times. One of the depositors was a stockholder in the bank in Philadelphia, and on offering to transfer his stock, permission to do so was refused on the part of the bank, under the eleventh article of the act of the 25th of March, 1820, which provides, that no stockholder indebted to the bank, for a debt actually due and unpaid, shall be authorized to transfer his stock or receive a dividend, until such debt is discharged or security to the satisfaction of the directors be given for the same. In consequence of this refusal, the stockholder brought suit against the bank, by whom no tender of the bills had been made to the firm: Held—

1. That the bank in which the bills were deposited having received them for transmission only, had fulfilled its duty by sending them for collection, with the instruction of the depositors, to the Bank of Virginia, for whose laches it was not responsible.
2. That although the extension of the bills in the books of the bank, and the bank-book of the depositors, was

- equivalent to payment, yet having been done under mutual mistake, the bank was not bound by it.
3. That the cashier having indorsed the bills, did not alter the legal relation of the parties, or add to the responsibility of the bank.
 4. That the settlement of the depositors' bank-book, did not alter the rights of either party.
 5. That it was not necessary for the bank to tender the bills to the depositors.
 6. That the bank had a right to refuse to permit a transfer of the stock of one of the firm, for a debt due from the partnership
 7. That the security for the alleged debt arising from the deposits of the firm, was not such as the bank was bound to take.
 8. That even if the firm had a balance in bank more than sufficient to pay the amount of the bills at the time permission to transfer was refused, yet the bank was justifiable, under the circumstances of the case, in refusing to allow the transfer to be made. *The Mechanics' Bank v. Earp*, 384
 9. It seems, that if the bank in Philadelphia had entered into a special agreement, or received a pecuniary reward for its services in collecting the bills, beyond a mere charge to cover expenses, and the Bank of Virginia was its agent for that purpose, it would have been responsible for the neglect of such agent, and an action might have been maintained for damages commensurate with the injury sustained in consequence of such neglect, *Ibid*.

BANK-BOOK.

See BANK, 2, 4.

BANK-NOTES.

1. By the act of March 22d, 1817, entitled "An act to prevent the making, issuing, receiving, and circulating certain descriptions of notes and tickets in the nature of bank-notes, and for other purposes," a note in the nature of a bank-note issued by an individual, is valid so far as to compel the drawer to discharge it, and is consequently the subject of property in the holder, and if stolen from him, it is the subject of larceny. *Sylvester v. Girard*, 185

2. In an action of trover by the holder of such a note against the drawer, who had got possession of it and refused to return it on the ground that it did not belong to the holder, it is not necessary for the defendant to give notice to the plaintiff, before the trial, that he must prove his property in the note. The plea of not guilty in trover, requires the plaintiff fully to make out his case, *Ibid*.
3. If such a note has been delivered to the plaintiff for the mere purpose of getting it exchanged, no property passes to him, and the circumstances of his being a creditor of the person delivering it, if no receipt or other acknowledgment of credit on the old debt be given at the time, does not alter the case, *Ibid*.
4. Quere, whether a promissory note given for a consideration partly legal and partly illegal, is valid for so much as is legal, *Ibid*.

BANK STOCK.

See BANK, 6, 7, 8

BARON AND FEME.

See HUSBAND AND WIFE.

BOND.

See SURETY, 1, 2, 3.

CERTIORARI.

See WRIT OF ERROR, 1.

CHoses IN ACTION.

See HUSBAND AND WIFE, 3.

CONSIDERATION.

See BANK NOTES, 4. FEIGNED ISSUE, 1.

CONTRACT

See AGREEMENT. COVENANT, 1, 2. FRAUD, 2. NEW PROMISE. TIME.

CONVEYANCE.

See LANDLORD AND TENANT, 3. RECORDING ACTS.

CORPORATION.

See EVIDENCE, 1, 2, 3. SPRING GARDEN STREET. UNION CANAL COMPANY.

1. The act of assembly of the 20th of March, 1818, "to improve the navigation of the river Lehigh," and that of the 13th of February, 1822, "to incorporate the Lehigh Coal and

Navigation Company," in whom the rights, &c., of the grantees under the former act became vested, in providing a remedy for injuries occasioned by the construction of the works, provide for nothing that was not remediable at common law, and, on the other hand, the statutory remedy extends to every common law injury. *Lehigh Bridge Company v. Lehigh Coal and Navigation Company*, . . . 9

2. A corporation (such as a bridge company), though not within the letter of the acts, is within their equity, and may recover damages in the mode prescribed by them, for injuries sustained in its property, . . . *Ibid.*
3. If a corporation omit to continue the succession to certain offices which constitute an integral part of its body, but these offices be supplied with officers *de facto*, it is sufficient to sustain its existence as to strangers, and to enable it to maintain a suit, *Ibid.*
4. The loss of an integral part of a corporation, works a dissolution to certain purposes only; the corporate franchise being suspended, but not extinguished. An entire dissolution is the result of a permanent incapacity to restore the deficient part, and never happens where the legitimate existence of the part is not indispensable to a valid election, or other means of reproduction, . . . *Ibid.*
5. A forfeiture of the charter of a corporation for abuse or neglect of its franchise, must be declared by process and judgment of law, before the corporation can be treated as defunct, *Ibid.*
6. The existence of a corporation plaintiff, can be put in issue only by a plea in abatement, or, at least, by such a plea as denies the whole declaration; pleading over specially to the merits, admits the plaintiff's capacity to sue, *Ibid.*

CORPORATE SEAL.

See EVIDENCE, 1, 2, 3.

COSTS.

See ARBITRAMENT.

COURT.

See QUARTER SESSIONS.

COVENANT.

See RENT CHARGE.

1. Covenants are to be construed dependent or independent of each other, according to the intention of the parties, and the good sense of the case; and technical words should give way to such intention *McClellish v. Churchman et al.*, 26
2. A. being indebted to B. in the sum of five thousand one hundred and seventy dollars and forty cents, for tallow, for which he had given eight promissory notes of different dates, for different sums, payable at different times, gave to B. his bond for five thousand dollars, payable in one year from its date, accompanied by a mortgage on his real estate, and paid him the balance of the debt, one hundred and seventy dollars and forty cents, in cash. On the same day, an agreement in writing was entered into between the parties, by which it was stipulated that B. should pay off and take up all the notes as they became due, and deliver them to A. The agreement contained a covenant on the part of B. to indemnify A. against all claims and demands arising on the notes. The notes all came to maturity before the bond was payable. B., without having taken up any of the notes, which were all protested as they became due, and remained in the possession of different holders at the time of the trial, issued a *scire facias*, on the mortgage: Held, that the bond, mortgage, and agreement, constitute one instrument, and that no recovery could be had on the mortgage, *Ibid.*

CRIMINAL LAW.

See INDICTMENT. SENTENCE.

DAMAGES.

See PRACTICE, 3. SURETY, 2, 3. UNION CANAL COMPANY.

DEBT.

See NEW PROMISE. PROTHONOTARY

DEED.

See FRAUD, 2. HUSBAND AND WIFE, 3. RECORDING ACTS.

A deed, purporting to convey all the right and title of the grantor to land of which he had previously parted with the fee simple, reserving only a right to a portion of the purchase-money charged upon the land, does

not pass his interest in the money so charged. *Craft, for the use of Powell, v. Webster*, 242

DEPOSITION.

1. A deposition read by one party on the argument of a rule to show cause why a feigned issue should not be directed to try his right to money in court, cannot be read in evidence by the opposite party on the trial of the issue, when the witness is himself in court, and capable of being examined. *Stiles et al. v. Bradford*, 394
2. Perhaps the reading of the deposition might be deemed an admission of the competency of the witness, so far as respects existing objections on the side of the party reading it, but it cannot be deemed such an admission of its contents, as to supersede the rule that the best evidence in the power of the party must be given, *Ibid.*

DEVISE.

1. Testator devised as follows:—"Principally and first of all, I give and bequeath to my eldest son, J. N., my late purchase from E. C., as also four acres of woodland being in a corner," &c. The land purchased from E. C., was purchased in fee simple, and held that a fee passed to the devisee, both in the land purchased from E. C., and in the four acres of woodland. *Neide v. Neide*, 75
2. Real estate, acquired after the making of a will, does not pass under a devise of the residue of the testator's real estate, without a subsequent republication of the will, even where the testator, in addition to the general devise of the residue, declares in a codicil, that it is his wish and intention that all the real estate which he shall thereafter purchase, shall pass by the said will. *Girard et al. v. The City of Philadelphia*, . . . 323

DIVIDEND.

See ASSIGNMENT.

DIVORCE.

See HUSBAND AND WIFE, 2.

1. On an appeal from the decree of the Court of Common Pleas on a petition for a divorce, an affidavit that it is not intended for delay, must be filed. *Brentlinger v. Brentlinger*, . . . 241
2. But such an affidavit is not a pre-

requisite to an appeal. Until the affidavit is filed, the appeal is not complete, but the court will not dismiss the appeal on the ground that such an affidavit has not been filed with the record, where the defect has been supplied during the term (even if the court be sitting by adjournment) and before motion to dismiss the appeal, *Ibid.*

3. Adultery, committed by the husband after the wife has separated herself from him, is no bar to his obtaining a divorce, in consequence of the wife's wilful and malicious desertion, and absence from his habitation without reasonable cause, for the space of two years and upwards. *Ristine v. Ristine*, 460

DOMESTIC ATTACHMENT.

See ATTACHMENT, DOMESTIC.

ELECTION.

See SHERIFF'S SALE, 2.

ENDORSEMENT.

See BANK, 3.

ERROR.

See SURETY, 2, 3. PRACTICE, 2.

1. If counsel submit to the court several distinct questions of law, with a request that the jury may be instructed on them, it is not error to answer them collectively, provided they all relate to the same matter and are answered fairly and fully. *Coates v. Roberts*, 100
2. The withdrawal of material facts from the jury is error. *Newbold v. Wright & Shelton*, 195
3. It is error to permit a party to read so much of the docket entries of the suit under trial, as shows that the opposite party had appealed from an award of arbitrators; though neither the award itself was read, nor that part of the docket entries which showed what the award was. *Humphreys v. Kelly*, 305
4. The expression by the court, of an opinion upon the evidence, even if incorrect, is not the subject of a writ of error. But if the court give a binding direction on the facts, and thus withdraw them from the jury, it is error. *Baker v. Lewis*, . . 356
5. To tell the jury that where a testator is of sound mind, and not under undue influence, he has a right, which cannot be controlled, to make

such disposition of his property as he pleases, and that under such circumstances, the reasonableness or otherwise, of his testamentary dispositions is of no consequence, is not error. But to instruct them that the contents of the instrument are not evidence, however unreasonable and absurd its testamentary dispositions may be, even where its execution is impeached on the ground of fraud and imbecility of mind in the testator, is error, *Ibid.*

6. It is no reason for reversing a judgment, that the court below rejected "sundry documents, letters, and other papers," not brought up with the record, or in any way connected with it, but stated in the bill of exceptions to have been "to and from the parties in the suit touching the premises in question, and matters in dispute," and to have been offered by the plaintiff in error as rebutting evidence to the jury, though similar "letters, documents, and other papers as to dates" were previously read by the opposite counsel without objection by the counsel of the plaintiff in error, and without its having been adverted to by the judge, that they were dated after suit brought; and though the judge rejected the documents, letters, and other papers offered, on account of their being dated after the commencement of the action. *Gratz v. Gratz*, 411

EXECUTION.

See RENT CHARGE.

If a *fiery facias* be issued, and returned "Levied as per inventory," &c., with an inventory annexed thereto, and immediately after its return an *alias fiery facias* be issued on the same judgment, and put into the sheriff's hands, with instructions from the plaintiff's attorney to stay proceedings for the present, the object being merely to secure the debt due to his client, it must be postponed to a *fiery facias* subsequently issued by another creditor, which has been duly acted upon. *Hickman v. Caldwell*.—*Black v. The Same*, 376

EXECUTORS AND ADMINISTRATORS.

See ORPHANS' COURT, *passim*.

1. There is a distinction between the

liabilities of executors with respect to creditors, and those with respect to legatees; and there are many cases in which they would be discharged as against the latter, though not against the former. *Case of M'Nair's Appeal*, 148

2. So long as executors manage the estate of their testator in accordance with the ideas which he himself entertained of it, and do nothing but what there is reason to believe he would have approved, could he have been consulted, it seems they are not responsible for losses as respects legatees; *aliter*, as respects creditors, *Ibid.*

3. Testator made a will of which he appointed his three sons, A., B., and C., executors, and directed that two of his sons, A. and B., should put out to interest for the use of his daughter R., two thousand six hundred and sixty-seven dollars of his estate, "on land security, or otherwise render it safe and productive, and pay the proceeds thereof to her from time to time, as they in their wisdom should judge most for her benefit." Among the assets which came into the hands of the executors, was a bond given to the testator by G. S. and his father J. S. in which the latter was surety. The bond was dated in 1810. In 1813, at a meeting of the creditors of G. S., an offer was made to the testator to pay off the bond, which he declined, saying he did not wish it paid during his life; he only wanted the interest. He continued to receive the interest until his death in 1816. J. S., the surety in the bond, died, in 1818, leaving a large estate. A suit was afterwards brought against his executors to recover the amount of the bond, but it was adjudged to be a joint and not a several bond, and that therefore there could be no recovery against the estate of J. S. as G. S. had survived him. G. S. became insolvent about the year 1817, and the money was lost. There was some evidence to show, that about a year after the death of the testator, one of the legatees offered to take the bond as part of her share of the estate, which A., one of the executors, would not agree to, intimating that he wished to retain it as a part of the fund to be set apart for the use of the testa-

tor's daughter R. It also appeared that G. S. in the year 1820, offered to A., one of the executors in satisfaction of the bond in question, a bond and mortgage on certain lands in Steuben county, New York, but it was not shown what was his title to the lands, nor what was their value, and the offer was refused. The executors appeared to have acted with good faith throughout the whole business, and in the suits instituted on the bond in controversy, acted under the advice of eminent counsel. Held, that under the particular circumstances of the case, of which the above are the principal, they were not responsible to the legatees for the loss of the bond, and that they were entitled to credit for the expense they incurred in endeavoring to collect it, . . . *Ibid.*

EVIDENCE.

See ATTACHMENT, DOMESTIC, 1. DEPOSITION. ERROR, 6. LEGACY, 3, 4, 6. PAROL EVIDENCE. PLEADING, 8. PARTITION, 1. RECORDING ACTS, 3.

1. The seal of a foreign corporation cannot be admitted in evidence without proof that it is the official seal which it is asserted to be. *Chew v. Keck et al.*, . . . 163
2. If a similar seal has already been given in evidence, without objection, the jury are not to be permitted to compare the two seals, and judge of the genuineness of the second from the comparison, . . . *Ibid.*
3. If upon a hearing of the cause before arbitrators, the seal has not been objected to, the party offering it on the trial in court, is not entitled, on the ground of surprise, to have a juror withdrawn, . . . *Ibid.*
4. An inquisition taken under a commission in the nature of a writ *de lunatico inquirendo*, finding that a person is of unsound mind, and has been so for a certain space of time prior to the finding, is *prima facie* evidence to show that a deed purporting to have been executed by such person during that period, is invalid on the ground of the mental incompetency of the grantor. *Hutchinson et al. v. Sandt*, . . . 234
5. It is, however, only *prima facie* evidence, and may be rebutted by the testimony of those who were acquainted with him during the period

in question, and knew him to have been of sound mind, or at least to have had lucid intervals, and that the deed was executed by him during one of those intervals, . . . *Ibid.*

6. And the members of the inquest who found him to be of unsound mind, are competent to prove such facts, so far as they are within their knowledge, but they cannot be examined for the purpose of proving what they conceived to be the nature of their finding, and that they did not intend to find or represent that he had been of unsound mind for the space of five years anterior to the inquisition, or that they did not know until after their report had been made, that it was retrospective in its operation, . . . *Ibid.*
7. A verdict and judgment between the same parties or their privies, on the same subject-matter, though in a different form of action, is admissible and conclusive. *Marsh v. Pier*, 273
8. Therefore, if P. brings an action for the price of goods against N., the record of the judgment is admissible and conclusive on the issue of property in replevin for the same goods, brought by P. against a purchaser under N.; and this, whether the judgment be for the plaintiff or the defendant in the first action, . . . *Ibid.*
9. A bill of particulars, if proved to be genuine, is evidence to show the precise subject-matter of an action, . . . *Ibid.*
10. A mutilated piece of paper, which appears to have been torn out of a book, in which the name neither of the plaintiff nor defendant appears, which contains no charges against the defendant, and which is unintelligible without explanation by the plaintiff, is not admissible in evidence, as a book of original entries. *Hough v. Doyle*, . . . 291
11. In an action of slander for calling the plaintiff a whore, the defendant cannot, under the plea of not guilty with leave to give the special matter in evidence, give evidence to prove that the plaintiff was a reputed thief before the time at which it was proved that he had spoken the words. *Smith v. Buckecker and wife*, 295
12. Nor can the defendant be permitted to prove, that before the time at

which he had spoken the words, it was reported, that the plaintiff had been accused by her sisters of having had connection with J. H., . . . *Ibid.*

13. A book, purporting to be a book of original entries, containing entries of the sale of goods, made when the goods were ordered, but before they were delivered, is not competent evidence of goods sold and delivered. Nor are arbitrary signs or marks affixed to the entry of each article, not for the purpose of charging the defendant, but of informing the porter so as to prevent a second delivery of a similar article, are not evidence of delivery, particularly when it appears that the signs or marks were not always made by the person who made the charge, nor by the plaintiff, or a clerk in his employment. *Rhoads v. Gaul et al.*, 404
14. Where a plaintiff makes an entry of goods sold upon a card, with pen and ink, and the same evening or the next day transcribes the entries into a book, the book is to be considered as the book of original entries of the plaintiff, and may be read in evidence to the jury, and the material on which the entry was first written, or its size and shape, are indifferent. *Patton v. Ryan*, 408

FACTOR.

See AGENT.

1. A factor cannot pledge the goods of his principal for his own debt. *Newbold v. Wright & Shelton*, . . . 195
2. A usage cannot be set up in opposition to a general rule of law; therefore, a usage for factors to pledge the goods of their principals, is bad. *Ibid.*
3. A supercargo, "to whom various shipments have been consigned by the same vessel, with instructions from one of the shippers to obtain an advance on his goods, cannot make a general deposit of the whole cargo, to secure a general advance, so as to bind his principals. It is his duty to keep the different interests separate, *Ibid.*
4. Where a general advance is made to a factor on a general deposit of goods owned by various persons, it must be borne ratably by all, . . . *Ibid.*
5. Where an agent sells the goods of his principal on credit, taking a note for the price gives notice of the sale

to his principal, and credits him in account with the amount of it, but omits to give notice of the non-payment of the note at maturity, the agent becomes responsible for the whole amount of the debt, and it is not necessary, to enable the principal to recover, that he should prove he has sustained any damage. The omission to give reasonable notice, makes the agent an insurer of the solvency of the purchaser. *Harvey v. Turner & Co.*, 223

FEE BILLS.

See FEES.

FEES.

Under the fee bill of the 28th of March, 1814, the recorder of deeds can only charge thirty-seven and a half cents for a certificate and seal, and cannot add to it a charge of twelve and a half cents for a search made to enable him to give the certificate. If he exacts payment of such double charge, he incurs the penalty of fifty dollars imposed by the 26th section of the fee bill. *Harrison v. Ellmaker*, 162

FEE SIMPLE.

See DEVISE, 1.

FEIGNED ISSUE.

1. On the trial of a feigned issue, to try the right of B. to have and receive, according to the amount of his liens, (under the revival by *scire facias* of certain judgments, the lien of which had expired by the lapse of time,) the money in court, in which it was agreed that the defendants in the issue should be entitled to the benefit of any question that might arise in relation to the lien of a judgment of reversal, or under the original judgment, the defendants cannot inquire into the consideration of such judgments, or travel into the cause of action on which they were founded. *Stiles v. Bradford*, 394
2. Under the act of the 16th of April, 1827, "relative to the distribution of money arising from sheriffs' and coroners' sales," the court has a right, where the estate has been sold as the property of R. under process against him, but is alleged to have been really the property of T., to direct a feigned issue to try the right of A

judgment creditor of T. to the money in court, *Ibid.*

FI. FA.

See EXECUTION.

FOREIGN ATTACHMENT.

See ATTACHMENT, FOREIGN.

FRAUD.

See ATTACHMENT, DOMESTIC, 3.
PLEADING, 1. SHERIFF'S SALE, 1, 2.

1. Parol evidence is admissible to show fraud in the formation of a written instrument, or a fraudulent use of it afterwards. *Oliver for the use of Rowland v. Oliver et al.*, 141
2. In the latter case, it is not necessary to have recourse to a writ of deceit; relief may be given in an action of trespass on the case, . *Ibid.*
3. The meditation and concealment by a grantee, at the time of the execution of the deed, of an impracticable plan of acquiring the property which is the subject of the grant, and afterwards refusing to perform the agreement which was the consideration of it, and subsequently acting in pursuance of such plan, are not such a fraud as will produce a rescision of the contract, and prevent the grantee from recovering in ejectment against the grantor. *Fritz v. Hooker*, 370

FRAUDS AND PERJURIES.

See PARTITION, 3, 4, 5, 6.

GROUND RENT.

See RENT CHARGE.

HUSBAND AND WIFE.

1. Testator devises to G. K., his executor, and to his heirs and assigns, a certain tract of land, which he purchased of W. S. E., with the appurtenances; also, all the goods and chattels assigned to him by the said W. S. E., to hold to him the said G. K. his heirs and assigns in trust, only to and for the sole and separate use of A. E., the wife of the said W. S. E., and the heirs and assigns of her the said A. forever, so that the same shall not be in any manner or way whatever, subject to any of the debts, contracts, or engagements of her husband. "I also give and

bequeath unto the said G. K. the sum of one thousand dollars in trust for the use of her the said A. E."

Ibid.

- Held, that the bequest of one thousand dollars, was not for the sole and separate use of the wife, but went to the husband. *Evans and Wife v. Knorr, Executor of Norton*, . . . 66
2. A legacy was left to a married woman, whose husband had deserted her, and from whom she was subsequently divorced from the bonds of matrimony. After the divorce she demanded payment of the legacy, which the executors refused, on the ground that the husband alone was entitled to it, although he had never claimed it, and it was uncertain whether he was dead or living.
- Held, that the wife was entitled to recover. *Wintercast v. Smith*, . . 177
3. A deed by a husband conveying the wife's choses in action to trustees for the benefit of the wife and her child, though not a reduction of such choses in action into possession, nevertheless passes not only the interest of the husband, but that of the wife also, to the trustees, upon the trusts declared in the deed. Consequently, upon the death of the husband, such choses in action do not survive to the wife, so as to entitle a husband whom she has subsequently married to claim them as her property. *Case of Siter et al. v. Jordan*, 468

INDICTMENT.

1. An indictment for stealing three promissory notes for the payment of money, commonly called bank-notes, on the Bank of the United States, is good. *M'Laughlin v. The Commonwealth*, 464
2. In an indictment for stealing promissory notes for the payment of money, drawn by a bank, it is not necessary to state that the bank was duly incorporated, *Ibid.*
3. Nor is it necessary that it should aver that the notes charged to have been stolen were due and unpaid, *Ibid.*

INQUISITION.

See EVIDENCE, 4, 5, 6. WRIT OF ERROR, 1, 2.

INSOLVENT DEBTOR.

See NEW PROMISE.

INSOLVENT LAWS.

See NEW PROMISE.

INTERPLEADING.

Of interpleading generally, and particularly, as it is practiced in Pennsylvania. *Coates v. Roberts*, . . 100

INTESTATE.

1. Where a person dies intestate, leaving no lawful issue, nor a father, but leaving a mother, and brothers and sisters, seized of real estate which he had from his father, or his father's legal representatives, as a purchaser for value, his mother is entitled to an interest in the estate under the seventh section of the act of the 19th of April, 1794. *Case of Jonas Hartman's Estate*, 39
2. Testator by his will directed that on his youngest child coming of age, his executors should sell the whole of his real and personal estate, and divide the proceeds equally between his wife and six children; and by a codicil directed that when his youngest son should be of full age, the estate should be appraised, and his sons, Jonas and Elias, should "have the first choice to accept the same, if they choose to do so." The executors, after the youngest child attained full age, exposed the premises to public sale, when they were struck off to a bidder who failed to comply with his contract; upon which one of the sons, Jonas, who was also one of the executors, agreed to take the estate at the price bidden, which was considered by the executors and heirs as a fair one, and a deed was executed to him by his co-executors. Jonas afterwards died, seized of the estate, leaving no issue, but leaving a mother and brothers and sisters. Held: that his mother was not entitled, under the seventh section of the act of 19th of April, 1794, to an interest in that portion of the estate, which would have descended to him if his father had died intestate, but that she was entitled to an interest in those portions which he acquired as a new purchaser, *Ibid.*

INTESTATE LAW.

See INTESTATE.

JUDGMENT.

See FEIGNED ISSUE, 1. PRACTICE, 3.
PROTHONOTARY. SHERIFF'S SALE,
1, 2. WRIT OF ERROR, 1, 2.

Under the act of the 4th of April, 1798, the lien of a judgment is restricted to a period of five years from the term of which it is entered, and the second period begins to run from the termination of the first. Consequently, where a judgment has been once regularly revived by *scire facias*, if ten years have elapsed from the first return day of the term of which the original judgment was entered, a second revival by *scire facias* comes too late as against an intervening mortgage. *Poole v. Williamson*, . 317

JUDICIAL SALE.

See LEGACY, 5.

LACHES.

See ATTORNEY. BANK, 1, 9.

1. Where a loss has been sustained by one of two or more innocent persons, it must be borne by him whose act was the cause of it. *Mechanics' Bank of New York v. The Bank of the United States*, 318
2. Therefore, where the plaintiffs, a bank in New York, stood in the relation of creditor to the defendants, a bank in Philadelphia, and the former received in Philadelphia, from the latter, in payment of the debt, specie drawn from other banks, and not from the defendants' own vaults, contained in boxes taken at the tale of those banks by the defendants in the first instance, and afterwards by the plaintiffs' agent, who had an opportunity, and every necessary facility to tell the money for himself, but omitted to do so, and the specie was afterwards, under the direction of the plaintiffs' agent, transferred from the boxes to kegs, and sent to New York, where it was afterwards discovered that there was a deficiency in some of the kegs, but it was impossible for the defendants to ascertain in which of the banks from which they had drawn the specie, the errors had occurred, it was held that the plaintiffs were not entitled to recover the amount of the alleged deficiency, *Ibid.*

LANDLORD AND TENANT.

1. A lease for no determinate period of time, but by which an annual rent is reserved, payable quarterly, is a lease from year to year, so long as both parties please. It is binding on the parties prospectively for one year only, capable, however, of being extended to a second, third, fourth, or fifth year, and so on, unless determined by the dissent of either party, which may be done at the close of any one year by giving three months' previous notice to that effect, but at no time before the close of a year, after it has once commenced. *Lesley et al. v. Randolph*, 123
2. Consequently, where the tenant continues to hold the demised premises until after the commencement of the second year, without offering to surrender the possession to the landlord or receiving from him notice to quit, he is entitled to hold for another year in despite of the landlord, but at the same time is bound to pay the year's rent quarterly, according to the agreement, *Ibid.*
3. A demise or conveyance of a "barn," without other words being superadded to extend its meaning, will pass no more land than is necessary for its complete enjoyment. *Bennett v. Bittle*, 339
4. Any entry by the landlord on the premises demised, against the will or wishes of the tenant, is not an eviction in point of law, which will suspend the rent. But if the landlord ejects, expels, evicts, or turns out the tenant, and prevents his enjoyment of the premises for which the rent is payable, the rent will be suspended; and whether there has been such an eviction, in point of fact, is a question for the jury, *Ibid.*

LARCENY.

See BANK-NOTES, 1. WRIT OF ERROR,
1, 2.

LEASE.

See LANDLORD AND TENANT.

LEGACY.

See HUSBAND AND WIFE.

1. Testator bequeaths to each of his children, six thousand dollars, to be paid to them respectively, as they severally arrive to lawful age, or on

the day of marriage, which ever may first happen. The residue of his estate, whatsoever, and wheresoever, he devises, and bequeaths to be equally divided among all his children, (naming them,) when his youngest child arrives at lawful age, to hold to them, their heirs, executors, administrators, and assigns, in equal shares, as tenants in common, and not as joint tenants. He then by his will declares, that if either of his above-mentioned children die under age, and without leaving issue, the share given to the child so dying, shall be equally divided, share and share alike, among all his surviving children, and the lawful issue of any of his said children, or of any grandchild, or grandchildren, who may then be dead, having left such issue, as tenants in common in fee, such issue, if one person only, or if several persons, as tenants in common, in equal shares in fee, always taking such part as his, her, or their parent or parents would have taken, if living. The devises and bequests above mentioned, were the only provision which the testator made for the maintenance of his children. His personal estate was about equal to the amount of his debts, the money legacies to his children, and the bequests to his wife; and the "residue" of his property consisted almost exclusively of real estate. One of his children died in his minority, unmarried, and intestate. Held, that the bequest of six thousand dollars, vested in him immediately on the death of the testator, and that his administrator was entitled to recover it, with interest from the time of the death of the testator, no other provision having been made for the maintenance of the legatee, during his minority. *Magoffin, Adm'r., v. Patton et al.* 113

2. A testator, having children living at the time of making his will, and having provided for the issue of those who were deceased, directs the residue of his estate to be divided, on the decease or marriage of a particular daughter, among his "present surviving children, and the representatives of those of them that shall be then deceased."—Held, that the issue of those deceased at the time of making the will, do not participate with the issue of those dead

- only at the happening of the contingency. *Hough, Exec'r of Hough, v. Hough et al.*, 363
3. A release of a pecuniary legacy charged upon land, not executed before at least two competent subscribing witnesses, is not within the provisions of the act of 15th of April, 1828; and therefore a certified copy of it from the recorder of the county, is not admissible in evidence under that act. *Hellman, for the use, &c., v. Hellman et al.*, 440
4. A release of such a legacy is not such a deed, conveyance, or writing, as passes or creates any right or interest, in or to the land on which it is charged, and consequently is not embraced by any of the acts of assembly, provided for the recording of deeds and conveyances or other writings, made of and concerning lands lying within this state, . *Ibid.*
5. The lien of a legacy charged upon land is discharged by a judicial sale of the land, though the legacy is payable by instalments, some of which are not due at the time of the sale, *Ibid.*
6. Where a release of a legacy charged upon land has been given in evidence, the record of a judgment on a bond given by the devisee of the land to the legatee, which from the declaration appears to have been of the same date as the release, is competent evidence, in an action brought to recover the amount of the legacy, to show, not only the fact that the judgment was had, but also its amount, and the consideration or cause of action, for which it was rendered, *Ibid.*
7. Where a legacy is charged upon land and payable by instalments, and the testator in a subsequent clause of his will declares that it is his will and desire, that the legatee "shall receive no principal, but receive the interest as it becomes due," the whole legacy is vested and the legatee may release it to the devisee of the land, *Ibid.*

LEHIGH COAL AND NAVIGATION COMPANY.

See CORPORATION, 1. PAROL EVIDENCE, 1, 2, 3.

The remedy given by the acts of assembly, incorporating the Lehigh Coal and Navigation Company, to the owner of land, to recover damages

for injuries done by the company in constructing their works, can be resorted to only where the parties are unable to agree upon the compensation to be made to the owner of the land. Where an agreement has been entered into, the remedy is by suit on the agreement. But if the company, after such an agreement, without regard to it, go on and make their canal through land different from that which was agreed on, the owner is at liberty to rescind the contract, and proceed under the acts of assembly. *Bertsch v. The Lehigh Coal and Navigation Company*, 130

LETTERS OF ADMINISTRATION.

See ATTORNEY, 1, 2.

LIEN.

See FEIGNED ISSUE, 1. JUDGMENT, 1. LEGACY, 5.

The sheriff has no right, power, or authority to sell land subject to one lien and discharged from another, without the consent of all the parties concerned. *Hellman, for the use, &c., v. Hellman et al.*, 440

LUNACY.

See EVIDENCE, 4, 5, 6.

MISTAKE.

See BANK, 2, 3, 4.

MORTGAGE.

See RECORDING ACT, 2. SHERIFF'S SALE, 1.

It seems that it is not necessary that an assignment of a mortgage should be in writing. *Craft, for the use of Powell, v. Webster*, 242

NEW PROMISE.

An absolute and unconditional promise by one who has been discharged by the insolvent laws of this commonwealth, to pay a debt which existed before his discharge, creates a new contract upon which suit may be brought. *Earnest v. Parke*, . . . 452

NOTICE.

See BANK-NOTES, 1. SHERIFF'S SALE, 2.

NUNCUPATIVE WILL.

1. Nuncupative wills are not to be favoured. *Case of Priscilla E. Yarnall's Will*, 46

2. To entitle a nuncupative will to probate, the provisions of the law must be strictly complied with, and the absence of due proof of a strict compliance with any one of them is fatal, *Ibid.*
3. The testamentary capacity of the deceased and the *animus testandi*, at the time of making the alleged nuncupative will, must be proved by the clearest and most indisputable testimony; and it must plainly appear from the evidence, that the instrument proposed to be proved, contains at least the true substance and import of the declarations made by the deceased, *Ibid.*
4. The *rogatio testium* must be at the time the alleged nuncupative will is made, which must be proved by two or more witnesses, who were then present; and it is not enough if the alleged testator declare his will first in the presence of one witness, and afterwards in the presence of another. The requisite number of witnesses must be present, and called on at the same time to attest the will, . . . *Ibid.*
5. A nuncupative will is not good unless it be made by the testator when he is in *extremis*, or overtaken by sudden and violent illness, and has not time or opportunity to make a written will, *Ibid.*
6. Therefore, where the alleged testatrix had been afflicted with a pulmonary consumption for about six months before her death, testamentary declarations, made nine days before her death, during which period, though weak in body, she retained the possession of all her faculties until the last hour of her life, were held, not entitled to probate as a nuncupative will, *Ibid.*

ORPHANS' COURT.

1. Under the act of April 1st, 1811, the Orphans' Court has no power to order a sale of the real estate of a testator, until the final settlement of the administration accounts. *Fox et al. v. Winters et al.*, 174
2. But irregularities in the proceedings cannot be inquired into in a collateral suit, if it substantially appear that the accounts were finally settled and confirmed previously to the order of sale, *Ibid.*
3. Nor can the purchaser at such sale be affected by the fraud of the ex-

ecutor in settling his accounts, unless it appear that the purchaser was a party to it or had notice of it before or at the time of the sale, . . . *Ibid.*

4. A decree of distribution protects an administrator from the consequences of a mispaying in rendering obedience to it. *Case of the Estate of Jacob Gerard Kock*, 268
5. An administrator may appeal from a decree of the Orphans' Court distributing the balance of an intestate's estate in his hands, although he is not a "party aggrieved," within the words of the 59th section of the act of Assembly of 29th of March, 1832, "relating to Orphans' Court." He is not a stranger, but a trustee for the parties, beneficially entitled, and the representative of those who may have been aggrieved, . . . *Ibid.*
6. The quantum of security to be taken by the Orphans' Court, upon an appeal from a decree of distribution, is a matter for their discretion, and is not necessarily to be measured by the quantum of the estate, . . . *Ibid.*

PAROL EVIDENCE.

See FRAUD, 1.

1. Parol evidence may be given to explain a written agreement, so far as to give locality and identity to the subject-matter of it, and apply the contract to it. *Bertsch v. The Lehigh Coal and Navigation Company*, . . 130
2. Therefore, where in a proceeding under the acts incorporating the Lehigh Coal and Navigation Company, to recover damages for injuries done by the company to the land of the plaintiff, the defendants pleaded in bar, a written agreement for the purchase of the plaintiff's lands, through which the defendant's canal was to pass, it was held, that the plaintiff might give parol evidence, that, at the time the agreement was entered into, the line or route of the canal was laid out and designated by stakes, set up through the plaintiff's land; that the written agreement was made in reference to this line; that the land lying between it and the river is the same land that is described in the agreement, and the defendants, instead of confining themselves to this line, as then staked out, in constructing and making their canal, or, at least, keeping between it and the river, extended the canal

beyond the line, and further from the river into the other land of the plaintiff, and thus cut off a greater quantity of land from the main body of his farm, than was agreed on, . *Ibid.*

3. But parol evidence is not admissible to show that the defendants agreed to build two locks upon that part of the canal which passed through the plaintiff's land, as a part of the consideration he was to receive for parting with it to the defendants; the written agreement containing no such provision, *Ibid.*

PARTITION.

1. If the plaintiff and defendant in an action of partition, have, by agreement, made partition between them, by which certain parts of the property are united to form one division, and certain other parts to form the other division, the opinion of witnesses is not admissible in evidence to show that a more equal and convenient partition might have been made by a different arrangement of the parts. *Gratz v. Gratz*, . . 411
2. A submission of all matters in variance between the parties, is sufficient to authorize the arbitrators to award a partition of real estate, and to direct in what manner it shall be executed, provided the partition of the property in question was one of the matters in variance at the time of the submission; but if the dispute arose afterwards an award upon it is void for want of authority on the part of the arbitrators to make it, . . . *Ibid.*
3. A parol agreement for the partition of lands is within the act of assembly for the prevention of frauds and perjuries, and does not pass the right which one party had at the time of the agreement to the other, in that part of the property allotted by the agreement to be held in severalty by the latter, *Ibid.*
4. Nor are the facts of one of the parties employing and giving instructions to a scrivener to draw deeds for carrying the partition into effect, and going on the property with an artist and measuring off and designating the lines of division, according to the agreement, for the purpose of enabling the scrivener to draw the deeds and to describe the several allotments with accuracy, or of the other party withdrawing from the

possession of that part of it which was, by the agreement, allotted to the former, and declaring that he held exclusive possession of the residue, which he intended to hold in severalty, according to the alleged agreement, such a part execution of the agreement as will take it out of the act against frauds and perjuries,

Ibid.

5. If the legal title to real estate be vested exclusively in one of two tenants in common, and the right of the other is merely equitable, being a trust resulting by operation of law from the purchase having been made with their joint funds, it is necessary under the act for the prevention of frauds and perjuries, that an agreement of partition should be in writing and signed by the parties or their agents, thereunto lawfully authorized in writing; and a parol agreement to make partition will vest no title either in the party holding the legal estate, or in him who has only an equitable interest, in the shares respectively allotted to each, *Ibid.*
6. Arbitrators without a submission in writing, can neither make partition of real property between the parties, nor award a partition to be made, so as to pass the interest of each party to the other, in their respective shares, *Ibid.*
7. An award of arbitrators "that the partition of the High street and Seventh street property agreed between the parties, according to the plan of M. B. shall be carried into effect," is void for uncertainty, *Ibid.*

PARTNERS.

The conversion by one partner of property, which came into the possession of the firm on partnership account, is the conversion of all, and makes all liable in trover. *Nisbet et al. v. Patton et al.*, 126

PARTNERSHIP.

See BANK, 6.

PAYMENT.

See BANK, 2.

PLEADING.

See ARBITRAMENT AND AWARD, 2, 4. CORPORATION, 6. INTERPLEADING. REPLEVIN.

1. Under the plea of payment to a *scire facias*, on a mortgage, with notice of special matter, if the defendant intend to insist on fraud in fact, it is not sufficient to allege in the notice of special matter, facts from which an inference of moral fraud may be drawn. The alleged fraud should be charged in the notice. *M'Crelish v. Churchman et al.*, 26
2. Where judgment is given in favour of the plaintiff on a demurrer to a plea in bar, it should be a judgment *quod recuperet*, and not *quod respondeat oster*; but if judgment *quod respondeat oster* be given, it is an error of which the defendant cannot complain, for it is in his favour. *Bauer et al. v. Roth et al.*, 83
3. To an action founded on a bond of indemnity *nil debet* is no plea, *Ibid.*
4. It is no cause of demurrer to a special plea, that the facts set forth in it may be given in evidence under the general issue, *Ibid.*
5. In an action on a bond of indemnity by two obligees, a plea, stating in substance that the defendant, with others (originally bound with him), agreed to join in the execution of the bond to one of the plaintiffs alone to indemnify him, &c., and positively refused to be bound to the other plaintiff in any manner or form whatever to indemnify him, &c., either severally, or jointly and severally with his co-plaintiff, and that neither of the obligors being able to read the English language in which it was drawn up, they all signed it upon trust, and delivered it to the plaintiff to whom they agreed to become bound, without having heard it read or explained or interpreted, and without having requested that it should be, believing that it was written in exact conformity to their previous agreement, but not stating how or why the deviation from their agreement happened, whether by fraud of the plaintiffs or mistake of the scrivener, is not sufficient to bar the plaintiffs' action, *Ibid.*
6. It is no plea against the further maintenance of an action, that one of the plaintiffs, since its institution, has applied for and obtained a discharge under the insolvent laws, and that his trustees have not given the security required by law, . . . *Ibid.*
7. A mere irregularity in point of time,

- in putting in a plea *puis darrein continuance*, is no cause of demurrer to the plea, whatever it might have been for setting it aside on motion; but the power to set it aside may be questioned since the act of 21st March, 1806, *Ibid.*
7. Query, whether in Pennsylvania, a plea *puis darrein continuance* is a waiver of a previous plea in bar, *Ibid.*
 8. It is not necessary to plead a former judgment, to make it either admissible or conclusive evidence. *Marsh v. Pier*, 273

PRACTICE.

See REPLEVIN.

1. In replevin, where the defendant pleads "property," there is still such a burthen of proof on the plaintiff, as to entitle him to commence and conclude to the jury. But, *Marsh v. Pier*, 273
2. It seems, that if the court below had ruled differently, it would not have been cause for reversal on writ of error. (Per Kennedy, J., the rest of the court giving no opinion on the point,) *Ibid.*
3. Where the action sounds in damages, judgment for the plaintiff on demurrer is interlocutory, and it is necessary before final judgment, that damages should be assessed by a jury. Until final judgment a writ of error does not lie. *Logan et al. v. Jennings*, 355

PRINCIPAL AND SURETY.

SEE SURETY.

PROMISSORY NOTE.

See ASSIGNMENT.

PROTHONOTARY.

- A prothonotary, in entering judgment on a bond accompanied by a warrant of attorney, according to the provisions of the act of assembly of 24th February, 1806, is not the agent of either party, or of the law, and the payment of the money by the debtor to him, is a mispayment, and does not discharge the debt. *Bauer v. Kistler*, 364

QUARTER SESSIONS.

See ROADS. SPRING GARDEN STREET.

The Presidents of the Courts of Quarter Sessions are not required by the act

of the 24th of February, 1806, to reduce their opinions to writing, and file the same of record. *Case of Spring Garden Street*, 192

RECORDING ACTS.

See LEGACY, 3, 4.

1. An assignment purporting to transfer all the right of the assignor in a sum of money charged, by agreement, upon land, in lieu of a widow's dower, the interest of which is to be paid to the widow during life, and the principal, after her death, to the assignor and others, is not within the meaning of the recording act of the 18th of March, 1775, and therefore it is not necessary that it should be acknowledged, or proved and recorded under that act, in order to preserve its validity against a subsequent assignment for a valuable consideration, without notice. *Craft, for the use of Powell, v. Webster*; . 242
2. It seems, that an assignment of a mortgage, is not within the provisions of the act above mentioned, *Ibid.*
3. It seems, that under the act of the 18th of March, 1775, conveyances, although not under the hands and seals of the parties respectively executing the same, "of or concerning any lands, &c., or whereby the same may be in any way affected in law or equity," may be recorded, after having been proved or acknowledged in the manner prescribed by law, and exemplifications of them read in evidence. *Hellman, for the use of Hellman et al.*, 440

RELEASE.

See ASSIGNMENT. LEGACY, 3, 4, 6.

RENT.

See LANDLORD AND TENANT. RENT CHARGE.

RENT CHARGE.

On a judgment in an action of covenant by the grantee of a rent charge, against the grantor, the whole of the lot out of which it issues may be taken in execution, although a part of it has been sold, *bona fide*, by the grantor, subsequently to the creation of the rent charge, and the vendee of such part has not been made a party to the action as terre tenant. *Brown v. Johnson*, 146

REPORT OF VIEWERS.

See ROADS.

REPLEVIN.

See PRACTICE, 1, 2.

On an issue taken in replevin on the plea of property, a general judgment for the plaintiff with damages, without specifying the value of the goods, *eo nomine*, is good. (Per Kennedy, J., the rest of the court giving no opinion on this point.) *Marsh v. Pier*, 273

ROADS

1. A conditional report of viewers appointed to assess damages in a road case, finding facts, but submitting to the court questions of law arising upon them, is bad. *Case of the Germantown and Perkiomen Turnpike Road Company*, 191
2. It is no objection to the report of viewers appointed to assess damages for opening a street, that they conversed with the owners of property adjoining, in the absence of the parties interested. *Case of Spring Garden Street*, 192
3. This court will not, on a *certiorari* to the Quarter Sessions to remove the proceedings in a road case, enter into the merits or determine facts, *Ibid.*

SALE.

See ORPHANS' COURT, 1, 2, 3.

An action for the price of goods, when prosecuted to judgment, is an affirmation of the sale; and the right to make such a sale cannot afterwards be gainsaid. *Marsh v. Pier*, . . 273

SCIRE FACIAS.

See JUDGMENT, 1.

SEAL.

See EVIDENCE, 1, 2, 3.

SECURITY.

See BANK, 7, 8.

SENTENCE.

Where a person has been sentenced to imprisonment, for a term to commence immediately after the expiration of a preceding sentence, and the first sentence is reversed upon error the term of the second begins

to run from the time of the reversal of the first. *Brown v. The Commonwealth*, 259

SHERIFF.

See LIEN.

SHERIFF'S SALE.

See FEIGNED ISSUE.

1. Where real estate held in the name of R. but really the property of T. is mortgaged by R. at the instance of T. and for his benefit, T. is the real mortgagor; and if it be sold by the sheriff by virtue of proceedings on the mortgage, a judgment creditor of T. is entitled to the surplus proceeds of the sale, in preference to a subsequent judgment creditor of R. who at the time of obtaining his judgment, was acquainted with all the circumstances of the ownership of the property, and of its being held by R. for the purpose of evading prior judgments against T. *Stiles et al. v. Bradford*, 394
2. Notice given by a judgment creditor of T. at a sheriff's sale of a leasehold interest as the property of R., that it was not really the property of R. but of T. and that his judgment was a lien upon it as such, is not an election to resort to that source for payment, and a waiver of his right to a fund on which he has a good claim, and which is available for the payment of his debt, *Ibid.*

SLANDER.

See EVIDENCE, 11, 12.

SPRING GARDEN STREET.

See ROADS, 2, 3.

The act of the 23d of April, 1829, directing that "Spring Garden Street, as now laid down and confirmed by the Court of Quarter Sessions of the City and County of Philadelphia, west of Tenth street, be continued of the same width from Tenth to Sixth streets," does not lay out a new and independent street, but is merely an amendment of the plan of the District of Spring Garden, as authorized by the act of incorporation, and confirmed by the court, and leaves the act of incorporation in force as regards the rights and remedies of the parties. *Case of Spring Garden Street*, 192

SURETY.

1. The obligors in a bond reciting that the obligees, together with M. are bound in seven obligations to the heirs of C. R. to be paid by the said M. and conditioned that he shall pay them on the days and times mentioned therein, and also to keep harmless and indemnify the obligors from all suits, payments, costs, and charges, in behalf of the recited obligations, are responsible for the default of the principal debtor in those obligations, though they may have passed into the hands of assignees. *Bauer et al. v. Roth et al.*, 83
2. There is no error in instructing the jury in reference to the defendants' liability on such a bond of indemnity, that "the plaintiffs' claim for damages does not rest on the ground of injury done them by reason of their liabilities as sureties for M. and on the neglect of M. to pay the heirs of C. R. The measure of damages is the amount of injury actually sustained," *Ibid.*
3. Nor is there error in charging the jury, that in strictness of law they might give the plaintiffs the full amount due in each of the actions on the recited obligations, mentioned in the breaches assigned in the declarations in the suit on the bond of indemnity, at the commencement of that suit, recommending to them, however, if they should find for the plaintiffs, to regulate the amount of the damages by the amount of moneys actually paid out by the plaintiffs, with interest from the time of such payments; the jury having adopted the recommendation and found a verdict accordingly, . *Ibid.*

TENDER.

See BANK, 5.

TIME.

How far time is of the essence of a contract, and where non-compliance with an agreement at the time stipulated, will be relieved against, and where not. *M'Crelish v. Churchman et al.*, 26

TROVER.

See BANK-NOTES, 2. PARTNERS, 1.

UNION CANAL COMPANY.

1. The act of assembly of 2d April, 1811, to incorporate the Union Canal Company of Pennsylvania, does not authorize the company to erect a dam across the whole channel of the river Schuylkill; but the supplementary act of 20th February, 1826, does authorize the erection of such a dam, and these acts being in *pari materia* must be construed as one act. Therefore the remedy provided by the 13th section of the act of 1811 for injuries to property therein mentioned, may be applied to obtain redress for such injuries as the erection of the dam may produce directly and immediately to property, or as may be in all cases of the like kind the inevitable consequence of its erection under the authority contained in the act of 1826. *Union Canal Company v. O'Brien et al.*, 358
2. The complainant, seeking a remedy under the acts above mentioned, must set out in his petition the nature of the alleged injury, and the particular ground of complaint, so that it may appear whether he claims damages for such an injury as the law provides a remedy for, or complains of *damnum sine injuria*; and if he fails to do so, this court will quash the proceedings of a jury giving him damages, and the judgment of the

Court of Quarter Sessions entered thereon, *Ibid.*

USAGE.

See FACTOR, 2.

VENDOR AND VENDEE.

See AGREEMENT, 1, 2.

WILL.

See DEVISE. ERROR, 5. LEGACY
NUNCUPATIVE WILL.

WITNESS.

See ASSIGNMENT. ATTACHMENT, DOMESTIC, 1. DEPOSITION. EVIDENCE, 6.

WRIT OF DECEIT.

See FRAUD, 2. PRACTICE, 3.

WRIT OF ERROR.

1. The judgment of the Court of Common Pleas in quashing an inquisition in a case of lunacy, is revisable by this court. But in such a case, a writ of error does not lie. The process by which the proceedings are to be removed is a *certiorari*. *The Commonwealth v. Beaumont*, 336
2. It seems, however, that the judgment of the Court of Common Pleas, after pleading to issue on a traverse of the inquisition, is revisable on a writ of error, *Ibid.*

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